127-678.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1359. 914

WILLIAM L. POWELL, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED MARCH 16, 1887.

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1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between William L. Powell, plaintiff in error, and The Commonwealth of Pennsylvania, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or

2 of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the fifteenth day of January, in the year of our Lord one thousand eight hundred and eighty-seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOSEPH P. BRADLEY,
Asso. Justice Sup. C't U. S.

[Endorsed:] Filed in S. C. of Pa. Jan. 21st, 1887.

3 The United States of America to the Commonwealth of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on second Monday of October next, pursuant to a writ of error filed in

the clerk's office of the supreme court of the State of Pennsylvania, wherein William L. Powell is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph P. Bradley, associate justice of the Supreme Court of the United States, this fifteenth day of January, in the year of our Lord one thousand eight hundred and eighty-seven.

JOSEPH P. BRADLEY,
Asso. Justice Sup. C't U. S.

4 Jan. 21st, 1887.—Service of the within citation accepted.

W. S. KIRKPATRICK,
Att'y Gen'l of Penna.
GEORGE KUNKLE,
District Attorney of County of Dauphin, State of Penna.
HALL & JORDAN,
Of Counsel for Com'th of Pa.
SAM'L J. M. McCARRELL,
Dist. Att'y at Time of Trial in the Sessions.

[Endorsed:] Filed in S. C. of Pa. Jan. 21, 1887.

5 The answer of the justices of the supreme court of the State of Pennsylvania to the writ of error from the Supreme Court of the United States, hereunto annexed, as follows, to wit:

Among the records and proceedings enrolled in the court of quarter sessions in and for the county of Dauphin, in the Commonwealth of Pennsylvania, to number 61, August sessions, 1885, is contained the following:

Copy of Sessions Docket Entry.

COMMONWEALTH *vs.* W. L. POWELL.

Docket entries:

Selling oleomargarine; on oath of H. A. Hoopes.

Sept. 5, 1885.—True bill.

Sept. 5, 1885.—Defendant, being arraigned, pleads not guilty.

Whereupon, trial ordered, jury called, come, etc., twelve good and lawful men of the county of Dauphin, duly selected, summoned, returned, etc., all of whom having been sworn or affirmed according to law, when, on motion, the trial of the cause continued until Sept. 11, 1885.

And now, Sept. 11, 1885, trial of this cause proceeded with and the jury aforesaid do say that they find the defendant guilty. Motion and reasons for a new trial filed Dec. 4, 1885. Motion for a new trial and in arrest of judgment overruled. See opinion filed.

January 29, 1886.—Sentence of the court, that defendant, W. L. Powell, pay a fine of one hundred ($100) dollars and the costs of

prosecution, or give bail to pay the same within ten days, and that he be in custody until the sentence be complied with.

And now, 16th of March, 1886, writ of error allowed.

6 It is further ordered that all proceedings for the enforcement of the sentence be suspended on the defendant entering into recognizance, with surety to be approved by a judge of said court of quarter sessions, in the sum of $500, conditioned for his appearance at the first term of said court after judgment entered on said writ of error, and not depart from said court without leave, etc., *per curiam.*

March 20, 1886.—Approved bond filed.

March 30, 1886.—Writ of error from the supreme court received and filed.

Certified.

[Seal of the Court of Q. S. of Dauphin County.]

WM. H. ULRICH, *Clerk.*

Transcript of Proceedings Before the Alderman.

THE COMMONWEALTH OF PENNSYLVANIA *vs.* W. L. POWELL.

Costs: Alderman, $2.30; Constable Hoopes, 62; witnesses, —.

Warrant issued on the 10th day of July, A. D. 1885, to H. A. Hoopes, constable, on oath of H. A. Hoopes, charging the defendant as follows:

That he verily believes and charges that W. L. Powell did, at Harrisburg, county of Dauphin, State of Pennsylvania, on July 10, 1885, unlawfully sell, offer for sale, and have in his possession in said county, with intent to sell the same as an article of food, a certain substance known as "oleomargarine" or "butterine," made in imitation of butter, manufactured from certain oleaginous substances, and compounds of the same, other than those produced from unadulterated milk or cream from milk, contrary to act of Assembly, &c.

July 10, 1885.—Defendant brought up and waives a hearing.

Defendant required to give bail in the sum of $200, conditioned for his appearance at the next term of court.

7 Defendant, W. L. Powell, residing at Harrisburg, and Charles Snyder, residing at Harrisburg, each held in the sum of $200, conditioned that the defendant will appear at the next court of quarter sessions of the peace for Dauphin county, and not depart said court without leave.

I hereby certify that the above is a correct transcript from my docket.

Witness my hand and seal this 22d day of July, A. D. 1885.

G. W. JACKSON, *Alderman.* [SEAL.]

(Endorsement:) No. 61. Aug. sessions, 1885. Com. *vs.* W. L. Powell. Charge: Selling oleomargarine. Returned July 25, 1885.

Copy of Indictment.

DAUPHIN COUNTY, *ss:*

In the Court of Quarter Sessions of the Peace for the County of Dauphin. August Sessions, 1885.

The grand inquest of the Commonwealth of Pennsylvania, inquiring for the county of Dauphin, upon their oaths and affirmations, respectively, do present that Walter L. Powell, late of said county, yeoman, on the 10th day of July, in the year of our Lord one thousand eight hundred and eighty-five, at the county aforesaid and within the jurisdiction of this court, with force of arms, &c., did unlawfully sell, as an article of food, two cases, containing five (5) pounds each, of an article designed to take the place of butter produced from pure, unadulterated milk or cream from milk, the said article so sold, as aforesaid, being an article manufactured out of certain oleaginous substances and compounds of the same other than that produced from unadulterated milk or cream from milk, and said article so sold, as aforesaid, being an imitation butter, contrary to the form of the act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

And the inquest aforesaid, upon their oaths and affirmations aforesaid, do further present that afterwards, to wit, on the day and year aforesaid, at the county aforesaid and within the jurisdiction of this court, with force of arms, &c., the said Walter L. Powell did unlawfully have in his possession, with intent to sell the same as an article of food, a quantity, viz., one hundred pounds, of imitation butter, designed to take the place of butter produced from pure, unadulterated milk or cream from the same, manufactured out of certain oleaginous substances or compounds of the same other than that produced from milk or cream from the same, contrary to the form of the act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

SAMUEL J. McCARRELL,
District Attorney.

8 (Endorsement:) 61. August sessions, 1885. Commonwealth *v.* W. L. Powell. 1. Selling imitation butter. 2. Having imitation butter with intent to sell the same. True bill. W. K. Burkholder, foreman. Sept. 5, 1885. Defendant pleads "Not guilty." Witnesses: H. A. Hoopes, pros.

Stenographic Notes.

HARRISBURG, PA., *September* 11, 1885.

The jury having been duly empaneled, District Attorney McCarrell opened the case for the Commonwealth.

It is agreed for the purposes of this trial that the defendant sold to the prosecuting witness, in the city of Harrisburg, July 10, 1885, as an article of food, two original packages, *pro ut*, the said packages

here produced in court, containing an article manufactured out of eleaginous substances and compounds other than that produced from unadulterated milk or cream from the same and designed to take the place of butter produced from pure, unadulterated milk or cream; that said packages were sold and bought as butterine and not as butter produced from pure, unadulterated milk or cream from the same.

It is further agreed that the said defendant had in his possession, with intent to sell the same as an article of food, one hundred pounds of said article.

It is further agreed that the packages so sold to the prosecutor and as now produced in court contain twenty-three pounds each, and that each package was then and is now marked with the words "Oleomargarine butter upon the lid and side of the package, in a straight line, in Roman letters half an inch long.

(Commonwealth rests.)

Mr. Gilbert opened the case for defendant.

Professor HUGO BLANCK, called by defendant, sworn:

The DISTRICT ATTORNEY: We ask our friends on the other side to state what they propose to prove by this witness.

Mr. GILBERT: May it please the court, the intention of the defendant, after proving the high scientific character of this wit-
9 ness and his experience, which qualifies him to testify as an expert in matters of this character, will appear in the offer that we are now about to make.

Mr. GORDON: In response to the request of the district attorney the defendant makes the following offer:

The defendant proposes to prove by Prof. Hugo Blanck that he saw the article sold to the prosecuting witness manufactured; that it was made from pure animal fats; that the process of manufacture was clean and wholesome; that the article contains the same elements as dairy butter; that the only difference between them is that the manufactured article contains a smaller proportion of the fatty substance known as butterine; that this butterine exists in dairy butter in the proportion of from three to seven per cent., and in the manufactured article in a smaller proportion, and was increased in the manufactured article by the introduction of milk and cream; that this having been done, the article contains all the elements of butter produced from pure, unadulterated milk or cream from the same, except that the percentage of butterine is slightly smaller; that the only effect of butterine is to give flavor to the butter, and has nothing to do with its wholesomeness; that the oleaginous substances in the manufactured article are substantially identical with those produced from milk or cream; that the article sold by the defendant to the prosecuting witness was a wholesome and nutritious article of food, and in all respects as wholesome and healthful as butter produced from pure unadulterated milk, or cream from the same.

The DISTRICT ATTORNEY: We object to the offer as totally imma-

terial and irrelevant to the issue now being tried. The defendant is indicted for the sale, as an article of food, of a certain substance prohibited by the Legislature from being sold as such, and the Commonwealth has proved, by his own admission, that he did sell, as an article of food, that prohibited article. We therefore say that any offer of testimony to show how that prohibited article was manufactured; to show what ingredients enter into the composition; to show that it is, in the opinion of the alleged expert witness now on the stand, wholesome as an article ef food, is immaterial and irrelevant to the issue. The Legislature, sitting to determine what is
10 necessary for the protection of the public health, has prohibited the sale of this article as an article of food, and the Commonwealth has shown, as I have already stated, by the defendant's own admission, that he did sell the prohibited article as an article of food.

Mr. GORDON: The defendant further offers to prove that he is engaged in the grocery and provision business in the city of Harrisburg, and that the article sold by him was part of a large and valuable quantity manufactured prior to the 21st of May, 1885, in accordance with the laws of this Commonwealth relative to the manufacture and sale of said article, and so sold by him; and that for the manufacture of said article large investments were made in the purchase of suitable real estate, the erection of proper buildings, and the purchase of the necessary machinery and ingredients; that in his traffic in the said article the defendant made large profits, and that if the said defendant should be prevented from trafficking in said article the value of his property engaged therein would be entirely lost, and he would be deprived of the means of livelihood.

The COURT: Please state the purpose of both offers.

Mr. GORDON: The purpose of this offer is to prove that the article sold is not an adulteration of dairy product, but a new invention; that it is wholesome and nutritious as an article of food and not injurious to the public health, and that its manufacture and sale are in conformity with the general acts of Assemby of May 22, 1878, and May 24, 1883.

The COURT: What legal conclusion do you intend to draw?

Mr. GILBERT: We will simply add to the first offer "for the purpose of showing that this act is unconstitutional."

Mr. GORDON: The purpose of the first offer is to show that the act of Assembly under which the defendant is indicted is unconstitutional and void and not a lawful exercise of police power. To the second offer we add that the act is void because it deprives the defendant of the lawful use of his property, liberty, and faculties, and destroys his property without making compensation.

The DISTRICT ATTORNEY: We object to the second offer on the same grounds as to the first—that it is immaterial and irrelevant to the issue now being tried.

The court sustains the objections to the offers in each case, and the evidence is excluded *pro forma*.

11 Exception noted for the defendant in each instance.

(Defendant rests.)

The COURT: Gentlemen of the jury, as this record now stands, the commission of the offense charged in the indictment is admitted, and it is therefore your duty to render a verdict of guilty.

To this charge defendant, by his counsel, excepts, and at his request this exception sealed.

J. W. SIMONTON, *P. J.* [SEAL.]

Verdict: Guilty in manner and form as he stands indicted.

Mr. GILBERT: The defendant respectfully moves the court in arrest of judgment and for a new trial, for the following reasons.

(Endorsement:) Dauphin county, Pa. Court of quarter sessions. Commonwealth *v.* W. L. Powell. Selling oleomargarine. Tried before Hon. John W. Simonton, president judge, and a jury, at Harrisburg, a. m. Friday, September 11, 1885. Appearances: Commonwealth—District Attorney McCarrell, Hon. Wayne MacVeagh, Hon. Francis Jordon; defendant—Lyman D. Gilbert, Esq., Hon. James Gay Gordon, Hon. D. T. Watson. Reported and transcribed in compliance with the act of Assembly approved
12 May 8, A. D. 1886. H. C. Demming, court stenographer.

Charge of the Court.

The COURT: Gentlemen of the jury, as this record now stands, the commission of the offense charged in the indictment is admitted, and it is therefore your duty to render a verdict of guilty.

To this charge defendant, by his counsel, excepts, and at his request this exception sealed.

J. W. SIMONTON, *P. J.* [SEAL.]

Motion and Reasons for Arrest of Judgment and for a New Trial.

The defendant respectfully moves the court in arrest of judgment and for a new trial, for the following reasons:

1. The act of Assembly of 21st May, 1885, entitled "An act for the protection of the public health and to prevent adulteration of dairy products and fraud in the sale thereof," which is the act of Assembly under which this prosecution was commenced, is in violation of the provisions of section 1 of article I of the constitution of the Commonwealth of Pennsylvania.

2. It is an unjust and unlawful interference with and infringement of the personal rights of property, business, industry, and liberty of the Commonwealth of Pennsylvania.

3. The said act of Assembly is unconstitutional and void, because it destroys property without making or providing any compensation therefor.

4. The said act of Assembly is not a constitutional and legal exercise of the police power belonging to the State, but is a deprivation of the property of the citizen without compensation.

5. The said act of Assembly is intended to, and actually does, deprive the defendant and other citizens of the State of Pennsylvania who have made similar investments and engaged in similar busi-

ness of their property without compensation and without legal reason for such deprivation.

6. The court erred, it is submitted with great respect, in rejecting the testimony offered by the defendant to show that the substance which he sold was a wholesome and proper article for food and was not an adulteration of any dairy product or manufactured or sold in fraud or imitation therefor.

7. The court erred, it is again submitted with great respect, in not instructing the jury that, under the law and facts of this case, the defendant had committed no offense and was entitled to a verdict of acquittal.

13 (Endorsement:) 61. August sessions, 1885. Commonwealth of Pennsylvania *vs.* W. L. Powell. Motion in arrest of judgment and for a new trial. Filed Dec. 4, 1885.

Opinion of the Court upon the Motion for a New Trial and in Arrest of Judgment.

By the COURT:

The defendant, who is engaged in the grocery and provision business in the city of Harrisburg, was tried in the court of quarter sessions of Dauphin county on an indictment based upon the act of May 21st, 1885, the first section of which is as follows: "No person, firm, or corporate body shall manufacture out of any oleaginous substance or any compound of the same other than that produced from unadulterated milk or of cream from the same any article designed to take the place of butter or cheese produced from pure, unadulterated milk, or cream from the same, or (of) any imitation or adulterated butter or cheese, nor sell or offer for sale, or have in his possession with intent to sell, the same as an article of food." The fourth section makes it a criminal misdemeanor to violate the provisions of the first section.

The offense charged was the selling, and having in his possession with intent to sell, the article, the manufacture and sale of which is prohibited by the act.

The following agreement was at the trial put in evidence by the Commonwealth:

"It is agreed, for the purposes of this trial, that the defendant sold to the prosecuting witness, in the city of Harrisburg, July 10th, 1885, as an article of food, two original packages, *pro ut*, the said packages here produced in court, containing an article manufactured out of an oleaginous substance and compound other than that produced from undulterated milk or cream from the same, and designed to take the place of butter produced from pure, unadulterated milk or cream; that said packages were sold and bought as butterine and not as butter produced from pure, unadulterated milk or cream from the same.

"It is further agreed that said defendant had in his posses-
14 sion, with intent to sell the same as an article of food, one hundred other pounds of said article.

"It is further agreed that the packages so sold to the prosecutor,

and as now produced in court, contain twenty-three pounds each, and that each package was then and is now marked with the words 'oleomargarine butter' upon the lid and side of the package, in a straight line, in Roman letters half an inch long." Whereupon the Commonwealth rested.

The defendant then produced an expert witness, and offered to prove by him certain matters, which, on objection by the district attorney, were excluded by the court.

These offers will be quoted at length hereafter in this opinion.

The case was then submitted to the jury, on the admission contained in the agreement in evidence, and a verdict of guilty was rendered.

Motions were then made on behalf of defendant for a new trial and in arrest of judgment, which were fully and ably argued and are now to be decided.

The able counsel for the defendant contended at the trial and on the argument of these motions—

First. That the act under which defendant was indicted and convicted is unconstitutional *per se;* and

Second. That the evidence offered and rejected was relevant to the question of its constitutionality as applied to the special facts of this case.

We must determine whether either or both of these positions can be maintained.

It results from the very nature of the case that when the question properly arises and a statute is found by the courts to be unconstitutional they must declare it void.

The Constitution of the United States is the supreme law of the land, and next to it, and higher in authority than legislative statutes, is the constitution of the State.

Hence, when a statute comes in conflict with either it must give way, and the courts must decide whether such conflict exists or not, when the rights of parties litigant depend upon such decision.

"Courts are organized and established to administer the laws
15 of the land. In their decision they are bound to preserve and protect those paramount laws which they are sworn to support." Flint River Steamboat Company *vs.* Foster, 5 Ga. 194; (48 Am. Dec., p. 256).

But, as is shown by Chief Justice Black in Sharpless *v.* The Mayor, 9 H., 147, a statute will be declared void by the court "only when it violates the Constitution clearly, palpably, plainly, and in such manner as to leave no doubt or hesitation on our minds." And he adds that this is a rule which "has the singular advantage of not being opposed even by a dictum." Again, in Erie and Northeast Railroad Company *v.* Casey, 26 Pa. St., 287, the same judge says: "The right of the judiciary to declare a statute void and to arrest its execution is one which, in the opinion of all courts, is coupled with responsibilities so grave that it is never to be exercised except in very clear cases. One department of the Government is bound to presume that another has acted rightly. The party who wishes

us to pronounce a law unconstitutional takes upon himself the burden of proving beyond a doubt that it is so."

And in the opinion of the court in Pennsylvania Railroad Company *v.* Riblet, 66 Pa. St., 164, Chief Justice Sharswood says: "Nothing but a clear violation of the Constitution—a clear usurpation of power prohibited—will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void." And the courts cannot inquire whether the Legislature has violated the general principles of liberty, or whether its enactments are unwise or inexpedient, but only whether it has overstepped the limits prescribed for it in the Constitution.

This is declared by Chief Justice Black in the clearest and most forcible language in Sharpless *v.* The Mayor, *supra*, thus: "To me it is as plain that the General Assembly may exercise all the powers which are properly legislative, and which are not taken away by our own or by the Federal Constitution, as it is that the people have all the rights which are expressly reserved. We are urged, however, to go further than this, and to hold that a law, though not prohibited, is void if it violates the spirit of our institutions or impairs any of those rights which it is the object of a free government to protect, and to declare it unconstitutional if it be wrong
16 and unjust. But we cannot do this." And he proceeds to show by reference to numerous authorities that, as he says, "the weight of authority is overwhelming" in support of the doctrine thus laid down; and in the later case of Commonwealth *v.* Maxwell, 3 Casey, 456, Chief Justice Woodward said: "A law that is unconstitutional is so because it is either an assumption of power not legislative in its nature, or because it is inconsistent with some provision of the Federal or State constitution."

We could cite numerous cases to show that the same doctrine is held by the highest courts of all the States, but we do not deem it necessary so to do. We have abundantly shown that it is the doctrine by which we must be governed in deciding this case. We will endeavor, first, to determine whether the act is unconstitutional, *per se*, irrespective of the evidence offered and excluded.

The burden of proof is, as we have seen, on the defendant. We have carefully considered the suggestions and arguments advanced by his able counsel, intended to show that the power to enact a statute such as the one in question, which, as they contend, deprives the defendant of the use of his faculties and takes from him a means of livelihood, is excepted out of the general grant of the legislative power contained in the Constitution by the express or implied limitations or prohibitions of the bill of rights or the body of the Constitution itself.

But, assuming for the present that the statute is in its nature legislative, we are wholly unable to find any limitation or prohibition which can be successfully pleaded against its enactment or enforcement; for whilst the bill of rights does declare "that all men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying life and liberty, and of acquiring, possessing, and protecting property and reputation,

and of pursuing their own happiness," this has never been construed to be a declaration that these rights are absolute.

On the contrary, as is said by Chief Justice Shaw, in Commonwealth *vs.* Alger, 7 Cushing, 53: "We think it a settled principle, growing out of the nature of well-ordered civil society, that
17 every holder of property, however absolute and unqualified his title may be, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property * * * is held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conversational rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the Legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient.

Hence, if the act in question be legislative in its character, the limitations which it prescribes for the defendant in the acquisition, possession, and use of his property are clearly within the boundary lines drawn by the Constitution, if, in the judgment of the Legislature, these limitations are considered necessary and expedient for the welfare of the community; and, if so, then, in so far as they do, if at all, interfere with the defendant's full enjoyment of his property, this interference results from the "law of the land."

It has not been even suggested in argument that this statute is in conflict with any of the provisions of the Constitution of the United States, and hence we need not refer to that instrument, except to say that, if it were so suggested, we think the contrary is clearly shown by Mr. Justice Miller, *in re* Broswaken, 18 Feb. Rep., 62.

But counsel contend that this enactment is not properly legislative in its character, but that, under the guise of a pretended exercise of the police power of the State, the Legislature has made an unwarranted attack upon private rights that, as stated by the learned counsel who closed the argument on behalf of the defendant, "in the form of government ordained by this people, and under which we live, the grant of legislative power never included a power for the destruction of a harmless industry, which is sought in this case to be exerted."

This brings us to the fundamental question in the case, namely, the question of the nature and the extent of the police power of the State.

18 This power is a proper subject for description rather than definition, and it has nowhere been more aptly described than by Chief Justice Shaw in Commonwealth *vs.* Alger, *supra*, at page 85, where it is said to be "the power vested in the Legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall

judge to be for the good and welfare of the Commonwealth, and of the people of the same."

This power, as was said by Mr. Justice Field in his concurring opinion in Bartemeyer *vs.* Iowa, 18 Wall., 138, extends to "all regulations affecting the health, good order, morals, peace, and safety of society, and under it all sorts of restrictions and burdens are imposed; and when these are not in conflict with any constitutional prohibition or fundamental principles they cannot be successfully assailed in a judicial tribunal."

We think the line between the valid exercise of this police power and the invasion of private rights is well drawn, in the opinion of the court, by Earl, J., in Jacob's case, 98 N. Y., 98, thus:

"Generally it is for the Legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety; and when its measures are calculated, intended, convenient, and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts; but they must have some relation to these ends. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the Legislature is not final and conclusive. If it passes an act ostensibly for the public health and thereby destroys or takes away the property of a citizen, and interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health. It matters not that the Legislature may, in the title to the act, or in its body, declare that it is intended for the improvement of the public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared and enforce the supreme law."

To the same effect is Commonwealth *vs.* Bearse, 132 Mass.,
19 542, where, speaking of the exercise of the police power, it is said: "The Legislature is largely the judge of its own powers with reference to these matters. If it can be seen, indeed, that the rights of property are invaded under the pretense of a police regulation, it would be our duty to interfere to protect them." And in Pennsylvania Railroad Company *vs.* Riblet, *supra*, the court say: "We cannot try the constitutionality of a legislative act by the motives and designs of the law-makers, however plainly expressed. If the act itself is within the scope of their authority it must stand, and we are bound to make it stand, if it will, upon any intendment." The point of contact between the power of the Legislature and that of the courts, with respect to the exercise of the police power, may be illustrated by the decisions relating to the power of taxation. This power, when exercised in the mode prescribed by the Constitution, is practically unlimited, but the courts will always determine whether a so-styled taxing act is in reality such, and if it be not, as for instance, if the purpose for which the tax is laid be a private and not a public purpose, the act will be declared unconstitutional and void. This is the principle lying at the foundation of the decisions of the numerous cases which hold that taxation in aid of the construction of railroads is constitutional, among which Sharpless *vs.*

The Mayor, *supra*, is a leading case. The taxation is upheld because the building of railroads is deemed a matter of public interest, and whenever the courts have considered that the construction of railroads is not a public matter, they have held that laws authorizing taxation for such a purpose are not in reality tax laws, an instance of which is People *vs.* Salem, 20 Mich., 452, decided by Mr. Justice Cooley. See note to Sharpless *vs.* Mayor, 59 Am. Dec., 782, citing a multitude of cases; see, also, cases relating to frontage rule of valuation of real estate for assessment purposes: Washington Avenue, 19 P. F. S., 352; Seely *vs.* City of Pittsburgh, 1 Norris, 360; Craig *vs.* City of Philadelphia, 8 Norris, 265; City of Philadelphia *vs.* Rule, 12 Norris, 15.

Another illustration is furnished by the cases relating to the exercise by the Legislature of the power of eminent domain. The Legislature may condemn, or authorize the condemnation of, private property for public use, and it may, in the exercise of its discretion, determine when and upon what property the power of eminent domain may be exercised, but its exercise is not beyond the reach of judicial inquiry. Whether or not a use is a public one which will justify the exercise of the power is a judicial question. Although the Legislature may declare it to be public, that does not necessarily determine its character; it must in fact be public, and, if it be not so, no legislative fiat can make it so. Palairet's Appeal, 17 P. F. S., 488.

On these principles the court of appeals of New York, in Jacob's case, *supra*, decided the statute there in question to be unconstitutional. It was entitled "An act to improve the public health by prohibiting the manufacture of segars and preparations of tobacco in any room in tenement houses in certain cases, and regulating the use of tenement houses in certain cases." It prohibited such manufacture in any tenement house occupied by more than three families, except on the first floor of houses on which there is a store for the sale of segars and tobacco. The court, on examining the nature and scope of the act, say: "It is plain that this is not a health law, and that it has no relation whatever to the public health;" and therefore it is pronounced unconstitutional. Had it been in reality a health law the decision would have been otherwise. So, in People *v.* Marx, 1 East. Rep., 196 (32 Abb. L. J., 6), where the defendant was indicted for a sale made in violation of the provisions of an act entitled "An act to prevent deception in the sale of dairy products," the body of which is substantially the same as that of the act now before us, the court held the act unconstitutional because they found that it was not a *bona fide* police regulation. They say: "It appears to us quite clear that the object and effect of the enactment under consideration was not to supplement the existing provisions against fraud and deception by means of imitation of dairy butter, but to take a further and bolder step, and, by absolutely prohibiting the manufacture and sale of any article which could be used as a substitute for it, however openly and fairly the character of the substitute might be averred and published, to drive the substituted articles

from the market and protect those engaged in the manufacture
21 of dairy products against the competition of cheaper substances capable of being applied to the same uses as articles of food."

"The learned counsel for the respondent frankly meets this view, and claims in his points, as he did orally upon the argument, that even if it were certain that the sole object of the enactment was to protect the dairy industry in this State against the substitution of a cheaper article made from cheaper materials, this would not be beyond the power of the Legislature. This, we think, is the real question presented in the case."

And, after referring to constitutional provisions and cases, the court adds: "Who will have the temerity to say that these constitutional principles are not violated by an enactment which absolutely prohibits an important branch of industry for the sole reason that it competes with another, and may reduce the price of an article of food for the human race?"

"Illustrations might be indefinitely multiplied of the evils which would result from legislation which should exclude one class of citizens from industries, lawful in other respects, in order to protect another class against competition. We cannot doubt that such legislation is a violation of the letter as well as the spirit of the constitutional provisions before referred to, nor that such is the character of the enactment under which the appellant was convicted."

This decision is manifestly correct, if we concede that the purpose and intent of the act were those thus found and declared by the court.

And, if we could be satisfied that the object and intent of the act in question here were what the court of appeals of New York declared the object and intent of the act before that court to be, we would not hesitate to pronounce it unconstitutional and void. But, having in mind the axiom that all the presumptions are in favor of the good faith of a co-ordinate department of the Government, and that to doubt is to be resolved in favor of the validity of its acts, how can we say that it is not the *bona fide* purpose of this statute, as expressed in its title, to protect the public health, and to prevent the adulteration of dairy products and fraud in their sale? And the Legislature having by passing the act declared its judgment that
the means used are necessary to attain these ends, we cannot
22 review this judgment, when exercised in good faith, for the conclusive reason that it is clearly within the jurisdiction of the Legislature to effect these purposes by appropriate means. "The fair presumption is that, in the honest judgment of the law-making power, exercised in the light of past legislation on the same subject, no less stringent enactment would have sufficed."

In accord with this view is the State *vs.* Addington, 12 Mo. App. Rep., 214, affirmed in 77 Mo. R., 110. There a statute substantially identical with ours was held to be a valid exercise of the police power of the State vested in the Legislature. This ruling was based upon the conclusion that the statute "was obviously passed in the form of a sweeping prohibition, because the Legislature were of

opinion, after two years' experience with the previous statute, that it was ineffectual to prevent our people from being defrauded by having an artificial compound sold to them as real butter. The design of the manufacturer and seller may be perfectly honest, but the person to whom they may sell the article"—the retail dealer—"may be dishonest; and, therefore the Legislature thought it best to lay the axe at the root of the tree by prohibiting entirely the manufacture and sale of such compound within the State."

The opinion delivered in this case in the intermediate court by Thompson, J., is worthy of attentive perusal by reason of its strength of reasoning and fullness of illustration and citation of authorities. We must content ourselves with a reference to a few only of the multitude of cases in addition to those already cited, which illustrate and confirm the principles we have stated and the conclusion we have reached. They are as follows: Slaughter-houses' Cases, 16 Wall., 36, where the court held that "An act to protect the health of the city of New Orleans," &c., which gave to a corporation the exclusive right to have all stock intended for slaughter landed at its stock-yard and butchered at its slaughter-house, was constitutional, because it was passed in the exercise of the police power of the State.

Butchers' Union Company *vs.* Crescent City Company, 111 U. S., 746, deciding that, although the act upheld in the slaughter-
23 house case just cited gave the corporation an exclusive right for twenty-five years by a valid contract, yet in the exercise of the police power the privilege of landing stock and maintaining a slaughter-house might, within that period, be granted also to another company. And see cases referred to in the opinion to show that the Legislature cannot by contract divest itself of the right to exercise the police power where deemed necessary: Beer Company *vs.* Massachusetts, 97 U. S., 25, in which it is decided, affirming Bartemeyer *vs.* Iowa, 18 Wall., 129, that a State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States, and that if the public safety or the public morals require the discontinuance of any manufacture or traffic the Legislature, in the exercise of the police power, may require its discontinuance even as against a corporation chartered for the express purpose of carrying it on.

Patterson *vs.* Kentucky, 97 U. S., 501, where the same principle is applied to an act forbidding the sale of an article for which a patent had been granted by the United States. Stone *vs.* Mississippi, 101 U. S., 814, where the same principle was applied to the charter of a lottery company. Barbier *vs.* Connelly, 113 U. S., 27, and Soon Hing *vs.* Crowley, *ib.*, 703, which hold that a municipal ordinance prohibiting washing and ironing in public laundries and wash-houses within certain hours is a valid exercise of the police power. In the latter case it is said: "The courts cannot inquire into the motives of the Legislature in passing an act, except as they may be disclosed on its face or inferrible from its operation considered with reference to the condition of the country and existing legislation."

Blair *v.* Forehand, 100 Mass., 136, holding that an act providing

that any person might kill any dog not licensed and collared, as provided by the statute, whenever found, was a valid exercise of the police power. Bertholf *v.* O'Reilly, 74 N. Y., 509 (30 Am. R., 323), deciding, after a full discussion of the extent of the police power, that a statute enacting that the lessor of premises, with the knowledge that they are to be used for the sale of intoxicating liquors, shall be liable for damage caused by the act of one intoxicated by liquor sold there is constitutional.

24 Woods *v.* State, 36 Ark., 36 (38 Am. R., 22), holding that under the statute forbidding the sale of ardent spirits by any person for any purpose without a license, a druggist cannot lawfully sell such spirits, even as medicine, upon the prescription of a physician—citing numerous cases to show that the right of the Legislature in the exercise of the police power of the State to regulate or prohibit the sale of intoxicating liquors has been settled by the courts beyond controversy.

State *vs.* Mugler, 29 Kan., 252 (44 Am. R., 643), which holds that a law prohibiting the brewing or selling of beer applied to beer lawfully manufactured before the law took effect but sold thereafter.

Davis *vs.* State, 68 Ala., 58 (44 Am. R., 128), where it is decided that a statute declaring it unlawful, within certain counties, to transport or move after sunset and before sunrise any cotton in the seed was constitutional.

Donnely *vs.* Decker, 58 Wis., 461 (46 Am. R., 637), in which the court held that a law providing for the drainage of lands, whenever the town supervisors shall deem it conducive to public health, and for the payment of damages and for the assessment of the whole costs on the lands benefited, was constitutional as an exercise of the police power.

Hawthorne *vs.* People, 109 Ill., 302 (50 Am. R., 610), deciding that a law requiring operators of butter and cheese factories on the cooperative plan to give bonds for faithful accounting for property received for manufacture is not unconstitutional.

Fry *vs.* State, 63 Ind., 552 (30 Am. R., 238), holding constitutional a statute regulating the issue and sale of tickets by railroad companies.

State *vs.* Ah Chew, 16 Nev., 50 (40 Am. R., 488), sustaining statute prohibiting the sale of opium.

Commonwealth *vs.* Waite, 11 Allen, 264. This case decides that the Legislature have the right, in the exercise of the police power, to make it a criminal offense to sell pure milk mixed with pure water.

Many of these cases, which are but a tithe of those pertinent to the subject which might be cited, are fully and ably reasoned and are supported by the citation of numerous authorities; taken

25 together, they furnish a very instructive discussion and illustration of the nature, extent, and limitation of the police power of the State, and its relations to the Federal and State Constitutions.

Thus far we have considered the case as if the question were merely whether the statute is or is not constitutional *per se.*

But the defendant offered to prove at the trial, by an expert witness, "that he saw the article sold to the prosecuting witness manufactured; that it was made from pure animal fats; that the process of manufacture was clean and wholesome; that the article contains the same elements as dairy butter; that the only difference between them is that the manufactured article contains a smaller proportion of the fatty substance known as butterine; that this butterine exists in dairy butter in the proportion of three to seven per cent. and in the manufactured article in a smaller proportion, and was increased in the manufactured article by the introduction of milk and cream; that this having been done, the article contains all the elements of butter produced from the pure, unadulterated milk or cream from the same, except that the percentage of butterine is slightly smaller; that the only effect of butterine is to give flavor to the butter, and it has nothing to do with its unwholesomeness; that the oleaginous substances in the manufactured article are substantially identical with those produced from milk or cream; that the article sold by the defendant to the prosecuting witness was a wholesome and nutritious article of food, and in all respects as wholesome and healthful as butter produced from pure, unadulterated milk or cream.

This for the purpose of showing that "the statute is unconstitutional, and not a lawful exercise of the police power."

Defendant further offered to prove "that he is engaged in the grocery and provision business in the city of Harrisburg, and that the article sold by him was part of a large and valuable quantity manufactured prior to the date of the passage of the statute in accordance with the laws of this Commonwealth relative to the manufacture and sale of said article, and so sold by him; and that for the manufacture of said article large investments were made in the purchase of suitable real estate, the erection of proper build-
26 ings, and the purchase of the necessary machinery and implements; that in his traffic in the said article the defendant made large profits, and that if the said defendant should be prevented from trafficking in said article the value of his property engaged therein would be entirely lost, and he would be deprived of the means of livelihood." This for the purpose of showing "that the act is void because it deprives the defendant of the lawful use of his property, liberties, and faculties, and destroys his property without making compensation."

On objection by the district attorney that the testimony recited in these offers was irrelevant and immaterral it was excluded by the court. If there was error in this, defendant is entitled to a new trial.

But we are unable to see how the admission of this testimony could have legally changed the result.

With respect to the first offer we are by no means prepared to say, even, that an offer to show that oleomargarine butter or butterine is made generally from pure animal fats by a pure and wholesome process, and is as wholesome and nutritious an article of food as genuine butter, would have been relevant. But this we are now

called upon to decide. The offer made was to show merely that the article admitted to have been sold in this case was such. No one doubts that it might be made as stated in the offer; but it is no less certain that it may be made out of oleaginous substances and compounds that are neither pure nor wholesome. How, then, could evidence that the substance sold in any given case, and admitted to be that proscribed by the act, was pure and wholesome tend to show that the statute which forbids all sales is unconstitutional? As well might a defendant on trial for selling spirituous liquors in a jurisdiction where all such sales were prohibited, while admitting that he had sold the prohibited article, offer to prove by way of defense that the particular glass of liquor sold was pure and wholesome. Witnesses could be called in almost every case who would be willing so to testify, but no court would admit such testimony for the purpose of showing that a prohibitory statute was unconstitutional.

Indeed, the question of the constitutionality of a statute cannot be determined on the testimony of witnesses, for the very
27 conclusive reason that it is a question of law and not of fact, and must be decided by the court on quite other grounds than those of the opinions and beliefs of witnesses. We are satisfied it was not error to refuse the testimony recited in the first offer.

We may here remark that this offer brings into view one of the reasons that impelled the Legislature to pass this act. It states that the amount of butterine in the manufactured article was increased by the introduction of milk and cream, and that the only effect of butterine is to give flavor to the butter.

Manifestly the purpose was to give this article as nearly as possible the flavor and semblance of butter, so that it might be sold as such by the retailer without detection, and no doubt this is the "fraud in the sale" which the act was designed to prevent.

We adopt, on this point, and apply to the statute now in question the language of the supreme court of Missouri in State *vs.* Addington, 77 Mo., 110:

"The central idea of the statute before us seems very manifest; it was, in our opinion, the prevention of facilities for selling or manufacturing a spurious article of butter resembling the genuine article so closely in its external appearance as to render it easy to deceive purchasers into buying that which they would not buy but for the deception. The history of legislation on this subject, as well as the phraseology of the act itself, very strongly tends to confirm this view. If this was the purpose of the enactment, we discover nothing in its provisions which enables us, in the light of the authorities, to say that the Legislature, when passing the act, exceeded the power confided to that department of the Government. And unless we can say this we cannot hold the act as being anything less than valid."

As to the second offer, it is to be observed that defendant did not propose to prove that the article was manufactured by him, nor that he purchased it or owned it prior to May 21st, the date of the passage of the act, nor even prior to July 1st, when it went into effect. Therefore, as we said of a like offer by Mr. Justice Bradley,

in his concurring opinion in Bartemeyer *vs.* Iowa, 18 Wall.,
28 129, on page 136: "The law was not in this case an invasion of property existing," in the defendant, "at the date of its passage, and the question of depriving a person of property without due process of law does not arise. No one has ever doubted that the Legislature may prohibit the vending of articles deemed injurious to the safety of society, provided it does not interfere with vested rights of property."

The motions for a new trial and in arrest of judgment are overruled, and the district attorney is at liberty to move for judgment upon the verdict.

J. W. SIMONTON, *P. J.*

Endorsement: 61. Aug. session, 1885. Com. of Penna. *v.* W. L. Powell. Opinion. Filed Dec. 5, 1885.

29 *Verdict of the Jury and Judgment thereon.*

"Guilty in the manner and form as he stands indicted."

The judgment of the court thereon was—

"The motions for a new trial and in arrest of judgment are overruled, and the district attorney is at liberty to move for judgment upon the verdict."

The sentence of the court on 29 January, 1886, was that the defendant should "pay a fine of one hundred dollars and costs of prosecution, or give bail to pay the same within ten days; that he be in custody until the sentence be complied with."

Petition for Special Allocatur.

In the Court of Quarter Sessions of Dauphin County. August Session, 1885.

COMMONWEALTH OF PENNSYLVANIA
vs.
W. L. POWELL. } 61.

To the honorable the chief justice and the justices of the supreme court of Pennsylvania:

The petition of W. L. Powell, who is a citizen and merchant of Harrisburg, Pennsylvania, respectfully represents:

On 21 May, 1885, an act of Assembly was approved entitled "An act for the protection of the public health, and to prevent adulteration of dairy products and fraud in the sale thereof." (Pam. Laws 1885, p. 22.)

This act made the manufacture or the sale of any oleaginous substance, or any compound of the same, other than that produced from unadulterated milk or of cream from the same, or of any article designed to take the place of butter and cheese produced from pure, unadulterated milk or cream from the same, or of any imitation of unadulterated butter or cheese, a misdemeanor punishable by fine or by fine and imprisonment.

30 On 10 July, 1885, your petitioner sold to a customer two original packages of an oleaginous substance, other than that produced from unadulterated milk or cream from the same, but designed to take the place of butter produced from pure, unadulterated milk or cream. These packages were sold and bought as butterine, and not as butter produced from pure, unadulterated milk or cream from the same. Each package was marked with the words "oleomargarine butter" upon the lid and side of the package, in a straight line, in Roman letters a half inch long.

Upon the same day, in pursuance of information made against him, a warrant was issued by an alderman of the city of Harrisburg, [and] your petitioner was arrested and gave bail to answer, at the next court of quarter sessions of the county of Dauphin, the charge of violating the provisions of the above-mentioned act of Assembly.

At the trial of the case the fact of the sale was admitted, and, after the Commonwealth closed its case, your petitioner offered to prove that the article sold by him to his customer was a wholesome and nutritious article of food, and in all respects as wholesome and healthful as butter produced from pure, unadulterated milk or cream. The defendant further offered to prove—

"That he is engaged in the grocery and provision business in the city of Harrisburg, and that the article sold by him was part of a large and valuable quantity manufactured prior to 21 May, 1885, in accordance with the laws of this Commonwealth relative to the manufacture and sale of said article, and so sold by him; and that, for the manufacture of said article, large investments were made in the purchase of suitable real estate, the erection of proper buildings, and the purchase of the necessary machinery and ingredients; that in his traffic in the said article the defendant made large profits, and that, if the said defendant should be prevented from trafficking in said article, the value of his property engaged therein would be entirely lost, and he would be deprived of the means of livelihood."

The object of these offers was—

1. To show that the act of Assembly under which your
31 petitioner was indicted was unconstitutional and void, and not a lawful exercise of police power.

2. That the act of Assembly is unconstitutional and void, because it deprived the petitioner of the lawful use of his property, liberty, and faculties, and destroys his property without making compensation.

The Commonwealth objected to the reception of the testimony contained in the two offers of your petitioner, the court sustained the objection, and exceptions were in each case noted for the defendant.

The court then charged the jury in the following manner:

"Gentlemen of the jury, as this record now stands, the commission of the offense charged in the indictment is admitted, and it is therefore your duty to render a verdict of guilty."

The jury thereupon rendered the following verdict against the defendant:

"Guilty in manner and form as he stands indicted."

Your petitioner, by his counsel, then moved the court in arrest of judgment and for a new trial, and filed a number of reasons showing that the act of Assembly above mentioned was unconstitutional, because it was not a valid exercise of the police power, and deprived the petitioner of the lawful use of his property, liberty, and faculties, and destroyed his property without making compensation for it.

The court, in an opinion, a printed copy of which is herewith inclosed, overruled the motion for a new trial and in arrest of judgment, and entered judgment upon the verdict.

Your petitioner believes that the judgment so pronounced was not in accordance with the Constitution and laws of this Commonwealth and of the Constitution of the United States, and feels it to be an act of great injustice to himself.

He therefore respectfully prays that you will grant an *allocatur* in order to permit a review by your honorable court of the proceedings had against him in this case in the court of quarter sessions of the county of Dauphin.

WALTER L. POWELL.

32 STATE OF PENNSYLVANIA, } *ss:*
County of Dauphin, }

W. L. Powell, the petitioner above named, being duly affirmed, deposes and says that the facts set forth in the above petition are true and correct to the best of his knowledge and belief.

WALTER L. POWELL.

Affirmed and subscribed before me this 13th day of March, 1886.

[SEAL.] CHRISTIAN W. LYNCH,
Notary Public.

March 20, 1886.—Approved bond filed.

March 30, 1886.—Writ of error from the Supreme Court received and filed.

33 *Special Allocatur.*

In the Court of Quarter Sessions of the County of Dauphin.

COMMONWEALTH *vs.* W. L. POWELL.

And now, 16th of March, 1886, writ or error allowed. It is further ordered that all proceedings for the enforcement of the sentence be suspended on the defendant entering into recognizance, with surety to be approved by a judge of said court of quarter sessions, in the sum of $500, conditioned for his appearance at the first term of said court after judgment entered on said writ of error, and not to depart said court without leave, &c.

Per curiam.

(Endorsement:) 61. August sessions, 1885. Commonwealth *v.* Powell. Filed March 16th, 1886. Filed in S. C. March 29th, 1886.

34 *Recognizance.*

In the Court of Quarter Sessions of Dauphin County. Aug. Sessions, 1885.

COMMONWEALTH OF PENNSYLVANIA
vs.
W. L. POWELL. } No. 61.

We and each of us, Hay Walker, Junior, and Emil Winter, do acknowledge ourselves, jointly and severally, indebted to the Commonwealth of Pennsylvania in the sum of five hundred dollars, to be levied of our and each of our lands and tenements, goods and chattels.

Whereas the above-named W. L. Powell, in pursuance of allowance of said court obtained on March 16th, 1886, has taken out a writ of error in said entitled case to the supreme court of Pennsylvania:

Now, the condition of this bond is such that if the said named W. L. Powell shall be and appear at the first term of the said court of quarter sessions of Dauphin county after judgment entered on said writ of error, and shall not depart said court without leave, then this obligation to be void; otherwise to be and remain in full force, virtue, and effect.

Witness our hands and seals this 19th day of March, 1886.

WALTER L. POWELL. [SEAL.]
HAY WALKER, JR. [SEAL.]
EMIL WINTER. [SEAL.]

Witnesses:
WM. M. WATSON.
L. H. MATHEWS.

35 STATE OF PENNSYLVANIA, } *ss:*
County of Allegheny, }

Personally before me, associate law judge of the court of common pleas number one, of Allegheny county, came the within-named Hay Walker, Jr., and Emil Winter, who being by me duly sworn according to law, doth depose and say that they and each of them are worth the sum of five hundred dollars over and above all their just debts and liabilities, and that each of them owns real estate over and above the value of five hundred dollars and free of all incumbrance.

HAY WALKER, JR.
EMIL WINTER.

And now, to wit, March 19, 1886, the above and foregoing bond having been presented to me, is hereby approved.

F. K. COLLIER,
Judge of Common Pleas No. one of Allegheny County, Penna.

Attest:
[Seal of Court of Common Pleas No. one of Allegheny County.]
JOHN BRADLEY, *Prothonotary.*

(Endorsement:) 61. August sessions, 1885. Commonwealth *v.* Powell. Bond. Filed March 28th, 1886. March 20, 1886, approved. J. W. Simonton, P. J.

36 *Supreme Court of Pennsylvania Docket Entries.*

At a supreme court of the State of Pennsylvania, sitting in and for the middle district of said court, at the city of Harrisburg, Pennsylvania, on the 21st Monday following the 1st Monday of January, A. D. 1886—present, the Honoroble Ulysses Mercur, chief justice; Isaac G. Gordon, Edward M. Paxton, John Trunkey, James P. Sterrett, Henry Green, and Silas M. Clark, justices, and William Pearson, prothonotary of the said court.

Among the records of the said supreme court of Pennsylvania, in and for the middle district, to May term, 1886, No. 15, it is contained as follows, to wit:

M. L. POWELL, Defendant below,
v.
COMMONWEALTH OF PENNSYLVANIA, Plaintiff below. } No. 61.

Error to the court of quarter sessions of Dauphin county. Aug. S., 1885.

Docket entries:

1886, March 29.—*Præc.* aff., and recog. filed.

Eo die, exit writ of error, returnable 21st Monday following 1st Monday of Jan.

37 1886, May 29.—Record returned and filed.

1886, May 29.—Assignments of error filed.

1886, June 2.—Argued.

1887, Jan. 3.—Judgment affirmed per Sterrett, J.

1887, Jan. 20.—Record remitted per self.

1887, Jan. 21.—Petition for allocatur of writ of error from the Supreme Court of the United States. Allocatur of said writ by Hon. Joseph P. Bradley, justice of said court, and said writ of error received and filed. *Eo die*, citation from said Honorable Joseph P. Bradley and acceptance of service thereof by the district

38 attorney of Dauphin county and Messrs. Hall & Jordan, attorneys for the Commonwealth, and writ of error bond in the sum of $500.00 received and filed.

Certified from the record.

[Seal of the Supreme Court of Pennsylvania, Middle District. 1776.]

WILLIAM PEARSON,
Prothonotary.

39 *Præcipe.*

In the Supreme Court of Pennsylvania for the Middle District.

W. L. POWELL, Defendant Below, Plaintiff in Error,
vs.
COMMONWEALTH OF PENNSYLVANIA, Plaintiff Below, Defendant in Error.

Issue writ of error to the court of quarter sessions of Dauphin county, at No. 61, of August sessions, 1885, returnable to May term, 1886.

WEISS & GILBERT,
Attorney- for Plaintiff in Error.

To William Pearson, proth'y supreme court of Pa., middle district.

Affidavit.

COMMONWEALTH OF PENNSYLVANIA, *ss:*

W. L. Powell, the above-named plaintiff in error, being duly affirmed according to law, deposes and says that the writ of error in this case is not intended for delay.

Affirmed & subscribed before me this 20 day of March, 1886.

CHRISTIAN W. LYNCH, [SEAL.]
Notary Public.

40 *Recognizance.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

In the Supreme Court of Penna. for the Middle District.

W. S. POWELL, Plaintiff in Error,
vs.
COMMONWEALTH OF PENNSYLVANIA, Defendant in Error. } No. 61.

Surwrit of error to the court of quarter sessions for the county of Dauphin, of Aug. sessions, 1886.

We, W. L. Powell, Hay Walker, Jr., and Emil Winter, severally acknowledge to owe the above-named defendant in error the sum of five hundred dollars, upon condition that the above-named plaintiff in error prosecute his writ of error with effect, and if judgment be affirmed, or the writ or error be discontinued or non-prossed to pay the debts, damages, and cost, adjudged accruing upon such judgment, and all other damages and costs that may be awarded upon such writ of error.

WALTER L. POWELL.
HAY WALKER, JR. [SEAL.]
EMIL WINTER. [SEAL.]

Taken and acknowledged this 19th day of March, A. D. 1886.

J. B. SWEITZER,
Pro. S. C., W. D.

41 (Endorsement:) No. 15. Supreme court. May term, 1886. W. L. Powell, plaintiff in error, defendant below, *vs.* Commonwealth of Pennsylvania, defendant in error, plaintiff below. Error to the quarter sessions of Dauphin county. No. 61. August sessions, 1885. *Præcipe*, affidavit, and recog. filed, and writ issued March 29, 1886. Rule, &c. Weiss & Gilbert, attorneys for plaintiff in error.

42 *Writ of Error from Supreme Court of Pennsylvania.*

MIDDLE DISTRICT OF PENNSYLVANIA, *sct:*

[Seal of the Supreme Court of Pennsylvania, Middle District.]

The Commonwealth of Pennsylvania to the justices of the court of quarter sessions for the county of Dauphin, Greeting:

Because in the record and process, and in rendering the judgment in a certain plaint which was in our said court, before the judges of the same court, by our writ, between W. L. Powell, plaintiff in error, and The Commonwealth of Pennsylvania, defendant in error, as it is said, manifest error hath intervened, to the great damage of the said plaintiff in error, as by complaint of the same plaintiff in error we have received information, we, willing that if any error be therein it should be corrected, and that speedy justice be done to the parties in this part, do command you that if judgment, as it is said, be rendered in the said plea, then the record and process and all things touching the same, under your seals, distinctly and openly, you have before the justices of our supreme court of Pennsylvania, at a supreme court to be held at Harrisburg, in and for the middle district of said Commonwealth, on the 21 Monday foll. 1 Mon. of Jan., 1886, being the 1st Monday of the term, and this writ, that, the record and process aforesaid being inspected, we may further cause to be done what of right and according to our laws and customs ought.

Witness the Honorable Ulysses Mercur, doctor of laws, chief justice of our supreme court, at Harrisburg, the 29th day of March, in the year of our Lord one thousand eight hundred and eighty-six, and of the Commonwealth the one hundred and tenth.

WILLIAM PEARSON,
Prothonotary.

43 Endorsement: No. 15. May term, 1886. Supreme court, middle district. W. L. Powell, plaintiff in error, *vs.* Commonwealth of Pennsylvania, defendant in error. Writ of error to the court of quarter sessions for the county of Dauphin. (No. 61, August sessions, 1885.) Returnable the 21st Monday following the 1st Monday of January, 1886. Rule on the defendant in error to appear and plead on the return day of the writ. N. B.—10 days' notice to the parties or counsel below is necessary to compel an appearance. Filed in Dauphin county common pleas March 30th, 1886. Filed in Supreme court May 29th, 1886. Weiss and Gilbert.

I certify that recognizance in error in $500.00, with Hay Walker, Jr., and Emil Winter as bail, has been filed in the supreme court.

WILLIAM PEARSON,
Prothonotary.

Service of this writ and rule accepted March 30th, 1886.

HALL & JORDAN,
Of Counsel for Commonwealth.

The record and process and all things touching the same, so full and entire as before us they remain, to the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the middle district, we certify and send as within we are commanded.

J. W. SIMONTON, *P. J.*

44 *Specifications of Error.*

1. The court erred in excluding the following offer of testimony: "The defendant proposes to prove by Professor Hugo Blanck that he saw the article sold to the prosecuting witness manufactured; that it was made from pure animal fats; that the process of manufacture was clean and wholesome; that the article contains the same elements as dairy butter; that the only difference between them is that the manufactured article contains a smaller proportion of the fatty substance known as butterine; that this butterine exists in dairy butter in the proportion of from three to seven per cent., and in the manufactured article in a smaller proportion, and was increased in the manufactured article by the introduction of milk and cream; that this having been done, the article contains all the elements of butter produced from pure, unadulterated milk or cream from the same, except that the percentage of butterine is slightly smaller; that the only effect of butterine is to give flavor to the butter, and has nothing to do with the wholesomeness; that the oleaginous substances in the manufactured article are substantially identical with those produced from milk or cream; that the article sold by the defendant to the prosecuting witness was a wholesome and nutritious article of food, and in all respects as wholesome and healthful as butter produced from pure unadulterated milk or cream from the same."

2. The court erred in excluding the following offer of testimony: "The defendant further offers to prove that he is engaged in the grocery and provision business in the city of Harrisburg, and that the article sold by him was part of a large and valuable quantity manufactured prior to the 21st of May, 1885, in accordance with the laws of this Commonwealth relative to the manufacture
45 and sale of said article, and so sold by him, and that for the manufacture of said article large investments were made in the purchase of suitable real estate, the erection of proper buildings, and the purchase of the necessary machinery and ingredients; that in his traffic in the said article the defendant made large

profits, and that if the said defendant should be prevented from trafficking in said article the value of his property engaged therein would be entirely lost, and he would be deprived of the means of livelihood."

3. The court erred in charging the jury as follows:

"The COURT: Gentlemen of the jury, as this record now stands, the commission of the offense charged in the indictment is admitted, and it is therefore your duty to render a verdict of guilty."

"To this charge defendant, by his counsel, excepts, and at his request this exception sealed."

4. The court erred in not instructing the jury that under the law and the facts in this case the defendant had committed no offense, and was entitled to a verdict of acquittal.

5. The court erred in overruling the motion in arrest of judgment and for a new trial.

6. The act of Assembly of May 21, 1885, under which this indictment was found against the defendant and sentence pronounced is unconstitutional and void, because it is in conflict with the fourteenth amendment of the Federal Constitution, which provides that "No State shall make or enforce any law which shall abridge
the privileges or immunities of citizens of the United States;
46 nor shall any State deprive any person of life, liberty, or
property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

(Endorsement:) No. 15. May term, 1886. W. L. Powell, defendant below and plaintiff in error, *vs.* Commonwealth of Pennsylvania, defendant in error. Specifications of error. Filed May 27, 1886.

47 *Petition of P. H. M'Gann for Leave to Intervene. Filed June 2d, 1886.*

POWEL, Plaintiff in Error,

vs.

THE COMMONWEALTH OF PENNSYLVANIA, Defendant in Error.

To the honorable judges of the supreme court of the State of Pennsylvania:

The petition of P. H. M'Gann humbly showeth—

1. That he is a citizen of the United States and a resident of the State of New York. Your petitioner has been for the past six years engaged in the business of making and selling oleomargarine. Your petitioner has now invested in said business about $75,000, and he employs between ninety and one hundred men.

2. Petitioner is informed and believes that the amount of capital invested in the United States in said business is $20,000,000, and the number of hands employed is one hundred thousand.

3. Your petitioner sells annually in the State of Pennsylvania of said merchandise to the amount of $300,000, and he believes that the total sales to inhabitants of that State are $3,000,000. All of

the said merchandise manufactured and sold by deponent is
48 pure and wholesome, made from nutritious substances, and wholly free from any noxious or deleterious ingredients. Deponent was prosecuted in the State of New York under a statute almost identical with the Pennsylvania act of 1885, and the court of appeals of New York, after full hearing, pronounced the said statute unconstitutional.

Deponent is advised that the question of the constitutionality of the Pennsylvania act will shortly be argued before your honors.

As the effect of a decision in favor of the said law would be destructive of the lawful business of petitioner in this State, he humbly prays that your honors will allow his counsel to intervene and to be heard at your bar in defence of your petitioner's interest.

And in duty bound, &c.

P. H. M'GANN.

Sworn to before me this 29th day of May, 1886.

[Seal of Thomas C. Moore.]

THOMAS C. MOORE,
Notary Public, Kings County.

Opinion of Supreme Court of Pennsylvania.

49 May Term, 1886.

W. L. POWELL
v.
COMMONWEALTH. } No. 15.

Error to quarter sessions of Dauphin county.

STERRETT, *J.:*

In his opinion overruling the motion for a new trial and in arrest of judgment the learned president of the quarter sessions has so fully and conclusively vindicated the correctness of the rulings complained of in the several specifications of error that the judgment may well be affirmed for the cogent and satisfactory reasons there presented. He has shown very clearly, we think, that the act of May 21st, 1885, under which plaintiff in error was indicted, is not in conflict with any provisions of either the State or Federal Constitution, and that the General Assembly, in enacting the law, did not transcend the limits of legislative authority; but if there should be any doubt as to the constitutionality of the act on either of these or any other ground, that doubt should be resolved in favor of the validity of the act as a proper exercise of legislative power. As was said in Erie & Northeast Railroad Co. *v.* Casey, 26 Penna. State Rep., 287–300: "The right of the judiciary to declare a statute void and to arrest its execution is one which, in the opinion of all courts, is coupled with responsibilities so grave that it is never to be exercised except in very clear cases. One department of the Government is bound to presume that another has acted rightly.
50 The party who wishes to pronounce a law unconstitutional takes upon himself the burden of proving beyond all doubt

that it is so." Or, as the principle is tersely stated by the late Chief Justice Sharswood: "Nothing but a clear violation of the Constitution -a clear usurpation of power prohibited—will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void." Penna. R. R. Co. *v.* Riblet, 66 Penna. State Rep., 164–169. In same case it is further said: "We cannot try the constitutionality of a legislative act by the motives and design of the law-makers, however plainly expressed. If the act itself is within the scope of the authority it must stand."

These principles are necessary incidents of the law-making power. In creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and complete authority as it rests in and may be exercised by the sovereign power of the State, subject only to such restrictions as they have seen fit to impose, and to the limitations which are contained in the Constitution of the United States. The legislative department is not made a special agency for the exercise of specially-defined legislative powers, but is intrusted with the general authority to make laws at discretion. Cooley's Con. Lim., 87.

The act of May 21st, 1885, is entitled "An act for the protection of the public health, and to prevent adulteration of dairy products and fraud in the sale thereof."

51 It cannot be doubted that the General Assembly is invested with full power to legislate for the protection of the public health, or to prevent the adulteration of articles of food, as well as imposition or fraud in the sale of such articles. In the absence of any constitutional inhibition or limitation, the sovereign power of the State to enact laws for the public good appears to embrace these subjects of legislation. But, however that may be, they are fairly within the police powers of the State. These powers, as described by Judge Redfield in Thorpe *v.* Railroad Co., 27 Vermont, 149, extend "to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State, and by which persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State; of the perfect right to do which no question ever was, or, upon acknowledged general principles, ever can be, made, so far as natural persons are concerned."

The statute books of this and other States furnish numerous examples of the exercise of the power referred to, but perhaps the laws most nearly identical in principle with our act are those which prohibit the sale of adulterated provisions. The sale of pure milk and pure water mixed may be made a penal offense: Com. *v.* Farren, 91 Mass., 489; Same *v.* Waite, 93 *id.*, 264; or adulterated

52 confectionery: Com. *v.* Chase, 125 *id.*, 202; Same *v.* Evans, 132 *id.*, 2.

The statute of Massachusetts declares: "Whoever sells or keeps or offers for sale adulterated milk, or milk to which water or any foreign substance has been added," shall be punished, &c. In Com. *v.* Farren, *supra*, the contention was that, inasmuch as it is innocent and lawful to sell either pure milk or pure water, or both, sepa-

rately, the Legislature has no power to make the sale of milk and water when mixed a penal offense, unless it is done with a fraudulent intent. But the court said: "It is notorious that the sale of milk adulterated with water is extensively practiced with a fraudulent intent. It is for the Legislature to judge what reasonable laws ought to be enacted to protect the people against this fraud, and to adapt the protection to the nature of the case. The court can see no ground for pronouncing the law unreasonable, and has no authority to judge of its expediency." Speaking of the prohibition liquor law of Massachusetts, passed in 1869, the Supreme Court of the United States says: "If the public safety or the public morals requires the discontinuance of any manufacture or traffic, the hand of the Legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police
53 power of the State. Whatever difference of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens and to the preservation of good order and the public morals. The Legislature cannot by any contract divest itself of the power to provide for these objects. They belong emphatically to the class of objects which demands the application of the maxim, "*Salus populi suprema lex;*" and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. Beer Co. *v.* Massachusetts, 97 U. S., 25.

So far as the constitutionality of the act under consideration depends on the police power of the State, it may safely be rested on the principle underlying the cases above referred to and those that might be cited. The manufacture, sale, and keeping with intent to sell may all alike be prohibited by the Legislature if in their judgment the protection of the public from injury or fraud requires it. To deny the authority of the Legislature to do so is to attack all that is vital in the police power. To refuse recognition of the power in a given case because in the judgment of some the Legislature, though acting within its proper sphere, may have mistaken the public necessity for a law prohibitory in its character is to make the
54 individual judgment superior to that of the Legislature, to which the people in their sovereign capacity have delegated the law-making power.

The fact that the prohibited substance in a pure state may be wholesome and not injurious is irrelevant in a judicial inquiry. The wholesomeness will not render the act unconstitutional. The statute is intended to prevent fraud and protect the public health by prohibiting the manufacture and sale of substances and compounds which furnish the temptation to commit the former and which may be injurious to the latter. As was said by the supreme court of Missouri in State *v.* Addington, 77 Mo., 110, that to render the law unconstitutional the prohibited articles must be unwhole-

some would utterly overthrow the police power of the State—overthrow every law the wisdom of which could not bear the test of scrutiny.

The case last referred to arose under a statute similar to ours, entitled "An act to prevent the manufacture and sale of oleomarginous substances or compounds of the same in imitation of pure dairy products." In a well-considered opinion the constitutionality of this act was sustained by the court of appeals (12 Mo. Ap. Rep., 214–228), and afterwards by the supreme court of that State. State *v.* Addington, 77 Mo., 110. "The mere fact," as was said in that case, "that experts may pronounce a manufactured article intended for human food to be wholesome or harmless does not render it incompetent for the Legislature to prohibit the manufacture and sale of the article. The test of the reasonableness of the police regulation prohibiting the making
55 and vending of a particular article of food is not alone whether it is in part unwholesome and injurious. If an article of food is of such a character that few persons will eat it, knowing its real character, if at the same time it is of such a nature that it can be imposed upon the public as an article of food which is in common use, and against which there is no predjudice, and if, in addition to this, there is probable ground for beleiving that the only [way] to prevent the public from being defrauded into the purchasing of the counterfeit article for the genuine is to prohibit altogether the manufacture and sale of the former, then we think such a prohibition may stand as a reasonable police regulation, although the article prohibited is in fact innocuous, and, although its production might be found beneficial to the public, if in trying they could distinguish it from the production of which it is the imitation. The manufacturer may brand it with its real name; it may carry that brand into the hands of the broker or commission merchant, and even into the hands of the retail grocer, but there it will be taken off, and it will be sold to the consumer as real butter, or it will not be sold at all. The fact that in the present state of the public taste, the public judgment, or the public prejudice with regard to it, it cannot be sold except by cheating the ultimate purchaser into the belief that it is real butter stamps with fraud the entire business of making
56 and vending it, and furnished a justification for a police regulation prohibiting the making and vending of it altogether." State *v.* Addington, *supra.*

In view of these and other considerations suggested in the opinion referred to, and also in that of the court below, we cannot say the act in question is not a valid exercise of the police power of the State. The Legislature was doubtless satisfied that the manufacture and sale of the prohibited articles were predjudicial to the public good to such a degree that a remedy was needed, and we have no right to say that a penal statute less severe and sweeping in its terms would have afforded an effective remedy. That is a legislative and not a judicial question. If it is thought the Legislature erred in the solution of that question the proper course is an appeal to them to correct the error, if any there was.

For reasons above suggested, and others more fully elaborated by the court below, we think the judgment should be affirmed.

Judgment affirmed and record remitted.

D. T. Watson, Weiss & Gilbert, and F. C. Brewster, for plaintiff in error; Wayne MacVeagh, S. J. M. M'Carrell, and Hall & Jordan, for defendant in error.

57 *Error to the Court of Quarter Sessions of the County of Dauphin. Argued June 2d, 1886.*

W. L. Powell *v.* Commonwealth.

Gordon, *J.:*

I regard the act of the 21st of May, 1885, not only as improvident and unreasonable, but as unconstitutional. "No person, firm, or corporate body shall manufacture out of any oleaginous substance or any compound of the same other than that produced from unadulterated milk or cream from the same any article designed to take the place of butter or cheese produced from pure, unadulterated milk or cream from the same, or imitation or adulterated butter or cheese, nor shall sell or offer for sale or have in his, her, or their possession with intent to sell the same as an article of food." A glance at this act shows that its purpose was to protect the dairy-men at the expense of the consumer. Cannot a pure, wholesome butter be made from some other oil than that extracted from milk? Certainly it can. The chemist has discovered that it may as well be manufactured from the fat of the cow as from the fat of her milk. "Oleomargarine, when made under the formula of the French patent, is composed mostly of beef fat churned with milk and colored with annatto." U. S. Agricultural Report, 1885, page 100. Here, then, is a pure and wholesome article of food, in every particular as good as
58 the best butter. Why, then, shall we not be permitted to make use of it? The act cannot properly be regarded as a police regulation, for it is not alleged that the prohibited article is in the slightest degree injurious to the welfare or happiness of the people of the Commonwealth. On the other hand, proof to the contrary has been offered, so that the question for discussion really involves the right of the Legislature to prohibit the manufacture of an article of food without regard to its character or quality—a question certainly of very serious import. The offer of proof was for the purpose of showing that the proscribed manufacture was not subject to the police power of the State, and, from its very nature, could not be. But the court ruled out the proposed evidence as irrelevant, thus declaring that the Legislature was the sole judge of its own powers. But this amounts to an assumption that the legislative power is such that manufacture and sale of any article of food whatever may be prohibited. So the question in fact is not one of police power, but whether the Legislature can, in contravention of fact, assume that any given article of commerce is within the scope of its police powers, and thereupon prohibit its manufacture and use. Truly, if this position taken by the court below be correct, then is

the defendant's case indefensible, for, if the Legislature can define its own powers without regard to constitutional limit, an appeal to this court is to no purpose.

In this, however, the Commonwealth is at fault. The quarter sessions has imposed a burden upon it which it cannot sus-
59 tain. Its counsel have said a great deal about the police powers of States, and have cited many cases to prove that which no one has pretended to deny, but they have utterly failed to prove that the General Assembly has the unrestricted power claimed for it. But if this astounding assumption fails the defendant was wrongfully convicted. Let us, then, consider to what result a doctrine of this kind must necessarily lead.

We must take it that that which was sold by the defendant was good, pure, and wholesome food, for such was the purport of the proposed proofs. Hence it follows, as of course, that if the Legislature can prohibit the making of butter from anything but milk it can prohibit its manufacture altogether, for pure milk is certainly no better than pure tallow, and if it can prohibit its manufacture from the latter it can also from the former. If it can make unlawful the making and sale of one kind of pure food, it can in like manner make unlawful the making and sale of any other. Lard, as it is found in the market, is a manufactured article, and is largely used in cooking as a substitute for butter. For ages this has been the case, as well in this country as in Europe, and no legislature has as yet taken exception to the practice on the ground of its unhealthfulness. Indeed, in this Commonwealth many persons subsist, during the winter season, almost entirely on buckwheat and lard, and with hard-working people, who require large quantities of
60 carbonaceous food, this diet is neither unpleasant nor unwholesome. It is true that some may not regard it as good as butter; nevertheless it is cheaper and therefore within the reach of those who cannot afford to pay for butter. Why, then, shall it not be used as heretofore? This wonderful act of 1885 will allow us to eat it as a substitute for pork, or beef, or bread, or as a substitute for any thing else but butter. And yet this is called a police regulation—a law passed for the preservation of the health of the community. To me it looks much more like a regulation passed for the welfare of the dairy-men without regard to the welfare of the balance of the people—class legislation, that political curse which the framers of our Constitution endeavored to prevent, but which our General Assembly seems disposed to perpetuate.

Nor are we to forget that by our decision we do not merely give force to an act of Assembly, but are also establishing a precedent of the most dangerous character; for if the Legislature can arbitrarily prevent the citizen from making or selling any given article of food, it can also prevent the buying or using the same, however excellent it may be, and however necessary for the preservation of his own life and happiness and that of his family; yet this is the doctrine which this court is about to establish by its decision—a doctrine which must necessarily be founded on the ruin of the bill of rights. What a commentary on nineteenth-century progress and

civilization. This act has made Chinese conservatism respectable.

61 The chemist has discovered a process by which an important article of food can be manufactured more cheaply than by the old methods, and the man of scant means is thus promised an addition to his meagre fare which he could not previously afford. Naturally we must suppose that this inventor would be hailed as the benefactor of his race, since he has thereby added much to the happiness of the laboring class of the people. "But no," say our lawmakers, "he is a malefactor, and shall neither make nor sell his product." And why? If, indeed, the Legislature had not in view the protection of the dairyman, I would like to be told by some one what it had in view. Of course the Commonwealth will not admit this as a solution of the question, for if a fact of that kind could be made to appear the unconstitutionality of the act would be undoubted. Hence this idea of police power has been set up as a lure, which has been only too successful in attracting the attention of the court below, as well as this court, from the real issue. What we have here said with reference to the legislative intention is made all the more certain from the fact that the acts of May 22d, 1878, and of June 10th, 1881, had already afforded sufficient protection to the community from deception in the sale and adulteration in the manufacture of butter; so that, as a police regulation, the act of 1885 was not necessary. We cannot, therefore, but think that there can be but little, if any, doubt that this act was designed to protect the interests of the producer at the expense of the welfare and rights of the consumer.

This view of the matter before us, I feel myself constrained to dissent from the judgment of this court.

62 (Endorsement:) No. 15. May term, 1886. W. L. Powell *vs.* Commonwealth. Error. Quarter sessions of Dauphin county. Sterrett, J. Filed Jan. 3d, 1887. Dissenting opinion—Gordon J.

Remittitur.

(Endorsement on remittitur:) No. 15. May term, 1886. Supreme court of Pennsylvania. W. L. Powell, plaintiff in error, *vs.* Commonwealth, defendant in error. Remittitur to Dauphin county.

Costs:

Prothonotary (paid by F. Jordan)	$7 00
Attorney	3 00
Writ (paid by plaintiff in error)	6 00
Amount	$16 00

Filed in quarter sessions of Dauphin county Jan. 20th, 1887.

63 MIDDLE DISTRICT OF PENNSYLVANIA, *sct:*

[Seal of Supreme Court of Pennsylvania, Middle District.]

The Commonwealth of Pennsylvania to the justices of the court of quarter sessions for the county of Dauphin, Greeting:

Whereas by virtue of our writ of error from our supreme court of Pennsylvania in and for the middle district, returnable in the said court on the 21 Monday foll. 1 Monday of Jan., in the year of our Lord one thousand eight hundred and eighty-six, a record was brought into the same court of a judgment rendered against W. L. Powell, plaintiff in error, at the suit of the Commonwealth, defendant in error, and it was so proceeded in our supreme court that the said judgment was affirmed and the record and proceedings thereupon and all things concerning the same were (agreeably to the directions of the act of Assembly in such cases made and provided) ordered by the said supreme court to be remitted to the court of quarter sessions for the county of Dauphin aforesaid, as well for execution or otherwise as to justice shall appertain; wherefore we remit you the record of the judgment aforesaid and the proceedings thereupon in order for execution or otherwise, as aforesaid.

Witness the Hon. Ulysses Mercur, chief justice of our supreme court, at Harrisburg, the 19th day of Jan., in the year of our Lord one thousand eight hundred and eighty-seven.

WILLIAM PEARSON,
Prothonotary.

64 *Return to Writ of Error from Supreme Court of the United States.*

And now, here, on this 19th day of January, A. D. 1887, the said Walter L. Powell produced to the Supreme Court of Pennsylvania here the writ of the United States of America for the correcting of errors of and upon the premises, commanding the record and proceedings aforesaid of the judgment aforesaid so as aforesaid rendered, with all things touching the same, to be transmitted to the Supreme Court of the United States, to be held at the city of Washington on the second Monday of October next, which writ of error is hereunto annexed.

In pursuance whereof, and according to the form and effect of the act of Congress in such case made and provided, a transcript of the record and proceedings of the judgment aforesaid so as aforesaid rendered, with all things relating to the same, together with the said writ of error, are hereby transmitted to the said Supreme Court of the United States accordingly.

Petition to Honorable Joseph P. Bradley for Writ of Error from Supreme Court of the United States.

65 In the Supreme Court of the United States. — Term.

W. L. POWELL
vs.
THE COMMONWEALTH OF PENNSYLVANIA. } No. —.

To the Honorable Joseph P. Bradley, one of the justices of the Supreme Court of the United States:

The petition of Walter L. Powell respectfully shows—

That he was indicted, at the instance of the Commonwealth of Pennsylvania, in the court of quarter sessions of the county of Dauphin, in the State of Pennsylvania, at No. 61, Aug. term, 1885, of said court, on the 5th day of September, 1885, under the provisions of an act of the General Assembly of the State of Pennsylvania entitled "An act for the protection of the public health and to prevent adulteration of dairy products and fraud in the sale thereof," approved the 21st day of May, 1885, and in said indictment he was charged with selling imitation butter and with having imitation butter with intent to sell the same.

Your petitioner entered a plea of not guilty, and the said cause was tried on the 11th day of September, 1885, and resulted, under the charge of the court, in a verdict of guilty; and subsequently your petitioner was sentenced on the said verdict to pay the costs of prosecution and a fine of one hundred dollars; that among

66 the defences set up by your petitioner on the trial of the said cause in the State court was this, that the said statute was repugnant to the Constitution of the United States in the following particulars: To the 14th amendment of the said Constitution in that it did abridge the privileges and immunities of your petitioner, who is, and was when the said offence was alleged to have been committed, and when said act of Assembly of the State of Pennsylvania was passed, a citizen of the United States; and that the said statute of the State of Pennsylvania did deprive your petitioner, a citizen of the United States, of his property without due process of law; and that the said statute did take, or cause to be taken, the private property of your petitioner for public use without just compensation, and therefore was repugnant to the 5th amendment to the Constitution of the United States.

That the decision of the trial court was against the right, privilege, and immunity set up and claimed by your petitioner under the Constitution of the United States, as heretofore specified; that the supreme court of the State of Pennsylvania, the highest court of that State in which a decision in the said suit could be had, affirmed the judgment and sentence of the court below on the 3d day of January, 1887; and said court also decided against the right, privilege, and immunity of your petitioner under the Constitution of the United States, as hereinbefore set out.

Your petitioner herewith presents a certified copy of the
67 record in the said case, including a bond given in the supreme court of the State of Pennsylvania in said cause by your petitioner when the writ of error was issued, and further showeth unto your honor that the offence with which he is charged is bailable under the laws of the State of Pennsylvania, and that he is not in custody, under the judgment and sentence of the said court.

Your petitioner, humbly complaining, showeth unto your honor that the said rulings and decisions, as hereinbefore set out, in the said court were, as he is advised and believes, erroneous and void, and that the said statute of the State of Pennsylvania is repugnant to the provisions of the 5th amendment and the 14th amendment of the Constitution of the United States.

Wherefore he prays your honor will allow and grant unto him a writ of error of the Supreme Court of the United States to the supreme court of the State of Pennsylvania in said case, and such other and further relief as may be appropriate.

W. L. POWELL.

STATE OF PENNSYLVANIA, } *ss:*
Dauphin County. }

Personally before me came the above-named Walter L. Powell, who, being by me duly sworn, says that the statements contained in the foregoing petition are correct and true, so far as made of his own knowledge, and in so far as made on information received he believes them to be true.

68 W. L. POWELL.

Sworn and subscribed before me this 8th day of January, 1887.

CHRISTIAN W. LYNCH, [SEAL.]
Notary Public.

A writ of error is allowed upon the foregoing petition, bond to be given by plaintiff in error, and proper sureties, to the amount of $500.00.

Washington, Jan. 15th, 1887.

JOSEPH P. BRADLEY,
Associate Justice Supreme Court.

Writ of Error Bond.

Know all men by these presents that we, W. L. Powell, of Harrisburg, Pennsylvania; and Hay Walker, Junior, of Allegheny City, Pennsylvania, and M. J. Sullivan, of Pittsburgh, Pennsylvania, are held and firmly bound unto the Commonwealth of Pennsylvania, its certain executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 22d day of January, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas lately, at a session of the supreme court of Pennsylvania,

in a suit depending in said court between W. L. Powell,
69 plaintiff in error and defendant in the court of quarter sessions of the county of Dauphin, and the Commonwealth of Pennsylvania, defendant in error in said supreme court of Pennsylvania and the prosecutor in the court of quarter sessions of Dauphin county, a judgment was rendered against the said W. L. Powell by the said supreme court of Pennsylvania in favor of the Commonwealth of Pennsylvania, and the said W. L. Powell, plaintiff in error as aforesaid in said case, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Commonwealth of Pennsylvania citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said W. L. Powell shall prosecute his writ of error with effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

W. L. POWELL. [SEAL.]
HAY WALKER, JR. [SEAL.]
MICHAEL J. SULLIVAN.

Sealed and delivered in presence of—
EDGAR KING,
As to W. L. Powell.
A. R. BURGWIN.

Approved by—

JOSEPH P. BRADLEY,
Associate Justice of Supreme Court U. S.

70 Personally before me came Hay Walker, Junior, and Michael J. Sullivan, each of whom, being duly sworn, says that each of us is worth, over and above all our debts and liabilities, the sum of five hundred dollars, and each of us own real estate in Allegheny county, Pennsylvania, fully worth, over and above all incumbrances, much more than five hundred dollars.

HAY WALKER, JR.
MICHAEL J. SULLIVAN.

Sworn to and subscribed this 22d day of January, 1887.
[Seal of S. C. M'Candless.]

S. C. M'CANDLESS,
U. S. Commissioner, Western District of Penna.

[Endorsed:] Filed in supreme court of Pa. January 31st, 1887

71 *Certificate.*

STATE OF PENNSYLVANIA, }
County of Dauphin, } *ss:*

In testimony that the foregoing, contained on pages one to seventy-one, inclusive, is a full, true, and correct copy of the record and proceedings of the supreme court of Pennsylvania, the highest court of law and equity in the State of Pennsylvania, in the case lately depending therein to No. 15 of the May term, 1886, middle district, wherein Walter L. Powell was plaintiff in error and The Commonwealth of Pennsylvania was defendant in error, I have hereunto subscribed my name and affixed the seal of the said supreme court, at Harrisburg, this 29th day of January, A. D. 1887.

[Seal of the Supreme Court of Pennsylvania, Middle District. 1776.]

WILLIAM PEARSON,
Prothonotary of the Middle District of the Supreme Court of Pennsylvania.

Endorsed on cover: Pennsylvania supreme court. No. 1359. William L. Powell, plaintiff in error, *vs.* The Commonwealth of Pennsylvania. Filed March 16, 1887.

127-678

Office Supreme Court U. S.
FILED
DEC 29 1887
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

WILLIAM L. POWELL,
Plaintiff in Error and Defendant Below,
vs.
THE COMMONWEALTH OF PENNSYLVANIA,
Defendant in Error and Plaintiff Below.

No. 914, OCTOBER TERM, 1887.

Error to the Supreme Court of the State of Pennsylvania.

BRIEF OF PLAINTIFF IN ERROR.

WEISS & GILBERT,
W. B. RODGERS,
D. T. WATSON,
Attorneys for Plaintiff in Error.



IN THE

Supreme Court of the United States.

WM. L. POWELL,

PLAINTIFF IN ERROR AND DEFENDANT BELOW.

VS.

THE COMMONWEALTH OF PENNSYLVANIA,

DEFENDANT IN ERROR AND PLAINTIFF BELOW.

No. 914, OCTOBER TERM, 1887.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

STATEMENT OF FACTS.

(References are to pages of printed Record.)

Powell the Plaintiff in error was indicted, tried and convicted in the Court of Quarter Sessions of Dauphin County, Pennsylvania, for selling Oleomargarine butter in violation of the provisions of an Act of the General Assembly of the State of Pennsylvania, Approved May 21st, 1885, entitled an "Act for the protection of the public health and to prevent adulteration of dairy products and fraud in the sale thereof," a copy of which will be found in the Appendix.

The indictment found September 5th, 1885, consisted of two counts and charged as follows: (page 4.)

(I.) That Powell "did unlawfully sell as an article of food "two cases containing five pounds each of an article *designed* "*to take the place of butter* produced from pure unadulterated "milk, or cream from milk, the said article so sold as afore- "said, being an article manufactured out of certain oleaginous "substances and compounds of the same other than that pro- "duced from unadulterated milk or cream from milk and said "article so sold as aforesaid, being an imitation butter "contrary, &c."

(11.) That said Powell "did unlawfully have in his posses- "sion with intent to sell the same as an article of food, a quan- "tity, viz.: one hundred pounds of imitation butter, *designed to* "*take the place of butter*, produced from pure unadulterated "milk or cream from the same, manufactured out of certain "oleaginous substances or compounds of the same other than "that produced from milk or cream from the same, con- "trary, &c."

The Defendant (Powell) pleaded not guilty. On September 11th, 1885, a jury was sworn and the only evidence offered by the Commonwealth was the following: (pages 4, 5.)

"It is agreed for the purpose of this trial that the Defendant "sold to the prosecuting witness in the city of Harrisburg, "July 10th, 1885, as an article of food, two original pack- "ages, *pro ut*, the said packages here produced in Court, con- "taining an article manufactured out of oleaginous sub- "stances and compounds, other than that produced from "unadulterated milk or cream from the same and designed to "take the place of butter produced from pure unadulterated "milk or cream; that said packages were sold and bought "as butterine and not as butter produced from pure unadul- "terated milk or cream from the same."

"It is further agreed that the said Defendant had in his "possession with intent to sell the same as an article of food, "one hundred pounds of said article."

"It is further agreed that the packages so sold to the prose-
"cutor and as now produced in Court, contain twenty-three
"pounds each and that each package was then and is now
"marked with the words 'Oleomargarine Butter' upon the
"lid and side of the package in a straight line in Roman
"letters half an inch long."

The Commonwealth then rested. There was no evidence on its part to show any adulteration of a food, product—or any deception or fraud—or that the article sold was not as wholesome as beef tea or wheat bread, or the very choicest dairy butter.

The Defendant below, Plaintiff in error, then offered to prove (pages 5 and 6,) as follows:

That a witness called saw the article sold to the prosecuting witness manufactured; that it was made from pure animal fats; that the process of manufacture was clean and wholesome; that the article contains the same elements as dairy butter; that the only difference between them is that the manufactured article contains a smaller proportion of the fatty substance known as butterine; that this butterine exists in dairy butter in the proportion of from three to seven per cent., and in the manufactured article in a smaller proportion and was increased in the manufactured article by the introduction of milk and cream; that this having been done the article contains all the elements of butter produced from pure unadulterated milk or cream from the same except that the percentage of butterine is slightly smaller; that the only effect of butterine is to give flavor to the butter and has nothing to do with its wholesomeness; that the oleaginous substances in the manufactured article are substantially identical with those produced from milk or cream; that the article sold by the Defendant to the prosecuting witness was a wholesome and nutritious article of food and in all respects as wholesome and healthful as butter produced from pure unadulterated milk or cream from the same.

This was objected to as immaterial and irrelevant and was excluded.

The Defendant below then further offered to prove

> That he is engaged in the grocery and provision business in the city of Harrisburg, and that the article sold by him was part of a large and valuable quantity manufactured prior to the 21st of May, 1885, in accordance with the laws of this Commonwealth relative to the manufacture and sale of said article, and so sold by him; and that for the manufacture of said article, large investments were made in the purchase of suitable real estate, the erection of proper buildings, and the purchase of the necessary machinery and ingredients; that in his traffic in the said article the Defendant made large profits, and that if the said Defendant should be prevented from trafficking in said article the value of his property engaged therein would be entirely lost, and he would be deprived of the means of livelihood.

This was also objected to as irrelevant and excluded.

The Court charged the Jury, (page 7), that "the commission of the offense charged in the indictment is admitted and it is therefore your duty to render a verdict of guilty"—and the jury so found. Judgment was entered on the verdict, and Powell was sentenced to pay a fine of one hundred dollars.

To the judgment of conviction in the Court of Quarter Sessions, a writ of error was sued out from the Supreme Court of Pennsylvania, and that Court affirmed the judgment of the lower Court.

The General Assembly of the State of Pennsylvania had passed an Act, approved May 24th, 1883, (*P. L.* 43) which was entitled, "An Act for the protection of dairymen and to prevent deception in sales of butter and cheese."

This related to Oleomargarine butter, and required the packages to be plainly branded or stamped "Oleomargarine Butter" in

Roman letters, one-half inch long, and as the Commonwealth itself proved by the admission on which its case depends th "oleomargarine" sold to prosecuting witness, as also that i possession of the Defendant, was so stamped.

An Act had prior thereto been passed, approved May 23, 187 (*P. L.* 87 and 88) entitled "An Act to prevent deception in th sale of butter and cheese" which required the stamp to be merel of the word "Oleomargarine."

Copies of each of these Acts will be found in the Appendix.

The history of Oleomargarine butter is briefly this: One Hi polyte Mége who was a noted scientist in France, for a number years conducted a series of experiments for the purpose of obtai ing a healthful and cheaper fat for the use of the working peop than the poor butter that they were compelled to use, and as a resu of such experiment he discovered that the fat of the beef anim and the fat from which dairy butter was made, were substantial identical, and that an artificial treatment of beef fat produced su stantially the same product as dairy butter at very much l expense.

In 1869, a patent was issued to him for his discovery of da July 15th, 1869, by France. On October 31st, 1869, Aust granted him a patent for the same thing. In England, on Ju 17th, 1869, a patent was granted him for the same thing. Bavaria, a patent was granted him on April 8th, 1873, for t same matter. On December 13th, 1873, he made an applicati in the United States for a patent, which was granted, Decem 30th, 1873, and of which there were several re-issues; but t patent was held to have expired in April, 1876, by reason of of the fact that that was the date of the expiration of the Bavar patent.

See the case of *The Commercial Manufactory Consolidated al. vs. The Fairbank Canning Company. The Official Ga of the United States Patent Office, Vol.* 36, *No.* 13, *page* 1473.

Oleomargarine butter is manufactured in the following manner: The fleshy fat of the beef is soaked in tepid water for about one hour, and is then washed and soaked in clear water. It is then hashed by machinery and heated in water-jacketed caldrons where the heat should never exceed 124° Fahrenheit. This heat divides the fat into (1) shreds of the membranes which settle at the bottom; (2) clear oil which is next, (3) a scum of the emulsion of fat and water. This oil is drawn off and kept for from thirty to thirty-six hours at a temperature of 85° Fahrenheit, when a portion of the stearine and palmatine crystalizes while the more easily fusible components remain as a liquor which is then squeezed out by pressure. The oil thus squeezed out in cooling hardens or freezes into a semi-solid condition and this constitutes a product known as oleomargarine or pearl oil. This oleomargarine is then treated the same as butter and is churned with milk and the product of the churning is called oleomargarine butter.

Appleton's Cyclopedia of Applied Mechanics, Title, Oleomargarine.

The Library of Universal Knowledge, Title, Oleomargarine.

The Encyclopedia Britannica, Title, Oleomargarine.

Report of the Commissioner of Internal Revenue for the fiscal year ending June 30th, 1887.

This is the product which Powell was indicted and punished for selling.

"Butter is an oily unctious substance obtained from milk or cream by churning." (Webster.)

The oily substance is from this same animal fat and is obtained by the cow elaborating her own fat through her cellulary mammary tissues at the temperature of her body. Globules of oil are taken from the cow by the extraction of her secretion, called milk, and by agitation of the milk these globules of oil are extracted from the other component parts of the milk, and after being treated as oleomargarine is, produces what is known as butter, or to distinguish it, dairy butter.

There are two ways then of producing butter. One is by the agitation of the milk and cream in the process of churning as above described and the addition of salt, etc., and the product of this is commonly known as butter, or dairy butter.

The other is by treating the animal fat of the beef as herein before described and then by the process of churning with milk and the addition of salt, etc., the product is produced called oleomargarine butter.

The two products are substantially identical, the difference being only that oleomargarine butter contains a smaller proportion of a fatty substance known as butterine, but this in no way affects its wholesomeness. This butterine in dairy butter exists in proportion of from three to seven per cent, while in the manufactured article it exists in a slightly smaller proportion.

Oleomargarine butter is just as wholesome and healthful as dairy butter.

Our offers of evidence (cited *supra*) would seem conclusively to show in substance the facts hereinbefore given, and if any additional authority is wanting we would refer this Court to the Encyclopedias hereinbefore referred to, or to any scientific or standard treatise on the question, and especially to the report of the Commissioner of Internal Revenue for the year ending June 30, 1887.

By an Act approved August 2d, 1886, Congress provided for the taxation of oleomargarine butter, and the regulation of its manufacture and sale.

United States Statutes at Large, vol. 24, *page* 209.

This Act provides for the appointment of an analytical chemist and a microscopist, and with their assistance gives to the Commissioner the power to decide whether any of the ingredients of any packages of oleomargarine butter contains matter deleterious to the public health, and in case of doubt, a Board composed of the Surgeon-General of the Navy, Surgeon-General of

the Army, and the Commission of Agriculture, who shall pass upon the question, and the decisions of this Board are conclusive.

The report of the Commissioner of Internal Revenue for the year ending June 30th, 1887, shows that for the eight months preceding June 30th, 1887, there was sold 21,796,202 pounds of oleomargarine butter which paid a tax under this Act.

To the judgment of the highest Court in the State of Pennsylvania, a writ of error was sued out to this Court, and the ground upon which we ask the interference of this Court, is that the oleomargarine act under which Powell was convicted and sentenced is in conflict with the fourteenth (14) amendment to the Federal Constitution in so far as it prohibits the manufacture and sale, or having for sale of oleomargarine.

The manner in which the questions to be passed upon by this Court are raised is by assigning for error the ruling of the Court of Quarter Sessions of Dauphin County, which were affirmed by the Supreme Court of Pennsylvania, and especially the ruling by the Supreme Court of Pennsylvania, that the State Act was not in conflict with the Federal Constitution.

ASSIGNMENTS OF ERROR.

(I.) The trial Court erred in sustaining the objections to and overruling an offer of the Defendant below, (now Plaintiff in error,) which offer and the objections thereto, and the ruling of the Court are as follows:

OFFER.

The Defendant proposes to prove by Professor Hugo Blanck that he saw the article sold to the prosecuting witness manufactured; that it was made from pure animal fats; that the process of manufacture was clean and wholesome; that the article contained the same elements as dairy butter; that the only difference between them is that the manufactured

article contains a smaller proportion of the fatty substance known as butterine; that this butterine exists in dairy butter in the proportion of from three to seven per cent., and in the manufactured article in a smaller proportion, and was increased in the manufactured article by the introduction of milk and cream; that this having been done, the article contains all the elements of butter produced from pure, unadulterated milk or cream from the same, except that the percentage of butterine is slightly smaller; that the only effect of butterine is to give flavor to the butter, and has nothing to do with its wholesomeness; *that the oleaginous substances in the manufactured article are substantially identical with those produced from milk or cream; that the article sold by the Defendant to the prosecuting witness was a wholesome and nutritious article of food, and in all respects as wholesome and healthful as butter produced from pure unadulterated milk or cream from the same.*

OBJECTION.

The District Attorney:—

We object to the offer as totally immaterial and irrelevant to the issue now being tried. The Defendant is indicted for the sale, as an article of food, of a certain substance prohibited by the Legislature from being sold as such, and the Commonwealth has proved, by his own admission, that he did sell, as an article of food, that prohibited article. We therefore say that any offer of testimony to show how that prohibited article was manufactured; to show what ingredients enter into the composition; to show that it is, in the opinion of the alleged expert witness now on the stand, wholesome as an article of food, is immaterial and irrelevant to the issue. The Legislature, sitting to determine what is necessary for the protection of the public health, has prohibited the sale of this article as an article of food, and the Commonwealth has shown, as I have already stated, by

the Defendant's own admission, that he did sell the prohibited article as an article of food."

RULING OF THE COURT.

The Court sustains the objection to the offer, and the evidence is excluded *pro forma*. Exception noted for the Defendant.

Which ruling of the Court of Quarter Sessions of Dauphin county was affirmed by the Supreme Court of Pennsylvania.

(II). The trial Court erred in sustaining the objections to and overruling an offer of the Defendant in the Court below (now Plaintiff in error), which offer and the objection thereto, and the ruling of the Court are as follows:

OFFER.

The Defendant further offers to prove that he is engaged in the grocery and provision business in the city of Harrisburg, and that the article sold by him was a part of a large and valuable quantity manufactured prior to the 21st of May, 1885, in accordance with the laws of this Commonwealth relative to the manufacture and sale of said article, and so sold by him, and that for the manufacture of said article large investments were made in the purchase of suitable real estate, the erection of proper buildings, and the purchase of the necessary machinery and ingredients; that in his traffic in the said article the Defendant made large profits, and that if the said Defendant should be prevented from trafficking in said article the value of his property engaged therein would be entirely lost, and he would be deprived of the means of livelihood.

OBJECTION.

The District Attorney:—

"We object to the offer as totally immaterial and irrelevant to the issue now being tried. The Defendant is indicted for

the sale, as an article of food, of a certain substance prohibited by the Legislature from being sold as such, and the Commonwealth has proved, by his own admission, that he did sell, as an article of food, that prohibited article. We therefore say that any offer of testimony to show how that prohibited article was manufactured; to show what ingredients enter into the composition; to show that it is, in the opinion of the alleged expert witness now on the stand, wholesome as an article of food, is immaterial and irrelevant to the issue. The Legislature, sitting to determine what is necessary for the protection of the public health, has prohibited the sale of this article as an article of food, and the Commonwealth has shown, as I have already stated, by the Defendant's own admission, that he did sell the prohibited article as an article of food."

RULING OF THE COURT.

The Court sustain the objection to the offer and the evidence is excluded *pro forma*. Exception noted for the Defendant.

Which ruling of the Court of Quarter Sessions of Dauphin County was affirmed by the Supreme Court of Pennsylvania.

(III). The trial Court erred in charging the jury as follows: Gentlemen of the Jury, as this record now stands, the commission of the offense charged in the indictment is admitted, and it is therefore your duty to render a verdict of guilty.

To this charge the Defendant by his counsel excepts and at his request this exception sealed.

J. N. SIMONTON, P. J. [SEAL].

Which charge of the trial Court was affirmed by the Supreme Court of Pennsylvania.

(IV). The Supreme Court of Pennsylvania erred in not sustaining and in over-ruling the following assignment of error.

The Act of Assembly of May 21, 1885, under which this indictment was found against the Defendant and sentence pronounced, is unconstitutional and void, because it is in conflict with the fourteenth amendment of the Federal Constitution, which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

(V). The judgment and conviction of the Plaintiff in error by the Quarter Sessions of Dauphin County, Pennsylvania, affirmed by the Supreme Court of Pennsylvania, deprived the Plaintiff in error of his liberty and property without due process of law and denied to him the equal protection of the laws.

(VI). The Supreme Court of Pennsylvania erred in ruling and holding as follows, (page 28):

" * * * We think that the Act of May 21st, 1885, under which Plaintiff in error was indicted, is not in conflict with any provisions of either the State or Federal Constitution, and that the General Assembly in enacting the law did not transcend the limits of legislative authority."

POINTS OF LAW.

(1.) The Supreme Court of Pennsylvania affirmed the constitutionality of the State Act on the ground that the Legislature was the sole judge of the limits of the police power and that the State Court was powerless to determine whether the Act in question had in truth a real and substantial relation to the public health, morals, peace or good order.

That we do no injustice to the Supreme Court of Pennsylvania in stating this conclusion, we refer to the entire opinion [pages 28 to 32], and we quote liberally from it.

The opinion, page 29 of the record says:

"We cannot try the constitutionality of a Legislative Act "by the motives and designs of the law-makers however "plainly expressed. If the Act itself is within the scope of "their authority it must stand. * * * *

The Act of May 21st, 1885, is entitled, "An Act for the protection of the public health, and to prevent adulteration of dairy products and fraud in the sale thereof."

"It cannot be doubted that the General Assembly is in- "vested with full power to legislate for the protection of the "public health or to prevent the adulteration of articles of "food as well as imposition or fraud in the sale of said "articles.

"In the absence of any constitutional inhibition or limi- "tation, the sovereign power of the State to enact laws for "the public good appears to embrace these subjects of legis- "lation. But however that may be they are fairly within the "police powers of the State. * * * *

"So far as the constitutionality of the act under consider- "ation depends on the police power of the State, it may "safely be rested on the principle underlying the cases above "referred to and those that might be cited. The manufac- "ture, sale and keeping with intent to sell may all alike be "*prohibited by the Legislature, if in their judgment the pro- "tection of the public from injury or fraud require it. To "deny the authority of the Legislature to do so is to attack all "that is vital in the police power. To refuse recognition of "the power in a given case because in the judgment of some "the Legislature, though acting within its proper sphere, may* "have mistaken the public necessity for a law prohibitory in "its character, is to make the individual judgment superior "to that of the Legislature to which the people in their sov- "ereign capacity have delegated the law-making power.

" *The fact that the prohibited substance in a pure state may* " *be wholesome and not injurious is irrelevant in a judicial* " *inquiry. The wholesomeness will not render the act uncon-* " *stitutional.* The statute is intended to prevent fraud and " protect the public health *by prohibiting the manufacture* " *and sale of substance and compounds which furnish the* " *temptation to commit the former and which may be injurious* " *to the latter.* As was said by the Supreme Court of Mis- " souri in *State vs. Addington*, 77 *Mo.* 110, that to render " the law unconstitutional the prohibited articles must be " unwholesome would utterly overthrow the police power " of the State—overthrow every law, the wisdom of which " could not bear the test of scrutiny.

" In view of these and other considerations suggested in " the opinion referred to, and also in that of the Court be- " low, we cannot say the act in question is not a valid exer- " cise of the police power of the State. *The Legislature was* " *doubtless satisfied that the manufacture and sale* of the pro- " hibited articles were prejudicial to the public good to such " a degree that a remedy was needed; and we have no right " to say that a penal statute less severe and sweeping in its " terms would have afforded an effective remedy. That is a " legislative and not a judicial question. If it is thought " the Legislature erred in the solution of that question the " proper course is an appeal to them to correct the error, if " any there was."

The decision then is rested on the police power of the State, for while what is called *the sovereign power* is hinted at, no stress is laid upon it. This police power belongs to the legislative department and the question involved of whether the act as a fact is an exercise of the police power—that is, as a fact, touches or concerns the public health or morals—is a legislative and not a judicial one.

The proof offered that the article sold instead of its being in the least injurious to the individual or the public is nutritious

and healthful, is irrelevant. That dealing in it was a harmless, profitable occupation amounts to nothing.

In the case of *Walker, et al., vs. Commonwealth of Pennsylvania, No.* 1303, October Term, 1887, of this Court, where the same Act was in question, the Supreme Court of Pennsylvania says (page 28 of the Record in that case):

> " This case is ruled by *Powell vs. The Commonwealth*, 19 " *W. N. C.* 24, so far as the question of the police power of " the State is concerned we were of opinion then, as we are " now, that the legislature has the power to prohibit the " manufacture and sale of an article detrimental to the " public health. *Whether oleomargarine was such an article* " *was a question of fact and one which has been determined* " *by the Legislature. We are bound to presume that it was* " *done upon sufficient evidence.*"

It is therefore the law in Pennsylvania that whether or no any given act is within the police power of the State is one which the Judiciary cannot determine but it rests wholly with the Legislature to define its own powers in reference thereto, for if the Legislature is the body which *finally* passes on the fact as to whether any given substance or thing is "detrimental to the public health," and when once this is decided the Courts are powerless to re-examine the question, *therefore* and *necessarily* the Legislature is supreme and there is no power anywhere to restrain them.

There is absolutely nothing then in this case which affirmatively shows that the State Act has any real or substantial relation to the public health, peace, good order or morals, except that the Supreme Court of Pennsylvania said they would *presume* it had because—*and only because*—the Legislature passed the Act, (though we offered as a fact to prove it had not) and the following sentence from the opinion of the Court (page 30):

> " The Statute is intended to prevent fraud and protect the " public health by prohibiting the manufacture and sale of

"substances and compounds which furnish the temptation to "commit the former and which may be injurious to the "latter."

(*a*) "To prevent fraud * * * by prohibiting the "manufacture and sale of substances and compounds which "furnish the *temptation* to commit the former (fraud)."

Any business then which "furnishes the temptation" to commit fraud may be prohibited according to this.

If so, as the banking business, all commercial enterprises of all kinds, the dairy business—particularly the manufacture and sale of bread and all the multiplied food products, and all branches of agriculture—do undoubtedly furnish *great temptation* to commit fraud, the Legislature may of its own motion prohibit them all and the citizen of Pennsylvania is as much a slave to the Legislature as the lowest peasant is to the Czar of all the Russias —he holds his liberty and property at their beck and nod.

The people of the State said in their Constitution:

"That the general great and essential principles of *liberty* "and free government may be recognized and *unalterably* "*established, we declare,*

(1) "That all men are born equally free and independent "and have certain *inherent* and *indefeasible* rights, among which "are those of enjoying and defending life and liberty, of "*acquiring, possessing* and protecting property and reputa- "tion, and of pursuing their own happiness,"

And then was added, for the protection of these rights, that they

"Are excepted out of the general powers of government "and shall forever remain inviolate."

Under this decision, what practical benefit are all these provisions? By whom are they to be enforced? How is the citizen to be given the benefit of them?

(*b*) "And which *may be* injurious to health"—not are—"*may be.*"

How will the citizen when his liberty is invaded and property taken prove it is not injurious to health. It is a fact capable of proof. Why may he not then prove it as any other fact? And if he once proves, as we offered to do, that it is not injurious to health, what becomes of the "may be."

The trial Court said that you could not introduce the proof of facts, and upon the finding of a jury one way or another, have the constitutionality of the law decided. And yet, the Supreme Court had directly affirmed and sanctioned that very practice.

Seely vs. City of Pittsburgh, 82 *Pa. St.*, 360.
Washington Avenue, 69 *Pa. St.*, 352.
Craig vs. Philadelphia, 89 *Pa. St.*, 265.

(II) Under the settled doctrine of this Court, however, whether a State Statute called a Police Law has a real or substantial relation to the public health, peace or morals is a judicial question and if it is found that it has not, but is an invasion of rights secured by the Federal Constitution, this Court will declare it void.

In the *Slaughter House case* 16, *Wallace* 87, Mr. Justice Field, said:— * * * * * * *

"Under the pretense of prescribing a police regulation the "State cannot be permitted to encroach upon any of the just "rights of the citizens which the constitution intended to "secure against abridgement."

In the same case, page 114, Mr. Justice Bradley said:—

"The right of a state to regulate the conduct of its citizens "is undoubtedly a very broad and extensive one, and not to

" be lightly restricted. But there are certain fundamental " rights which this right of regulation cannot infringe. It " may prescribe the manner of their exercise but it cannot " subvert the rights themselves."

In *Munn vs. Illinois* 94, *U S.* 145, Justices Strong and Field, concurred in saying:—

" The power of the State over the property of the citizen " under the constitutional guaranty is well defined. * *

" The doctrine that each one must so use his own so as not " to injure his neighbor, *sic utere tuo ut alienum non lædas* " is the rule by which every member of society must possess " and enjoy his property, * * Except in cases where " property may be destroyed to arrest a conflagration or the " ravages of pestilence, or be taken under the pressure of an " immediate and overwhelming necessity to prevent a public " calamity the power of the State over the property of the " citizen does not extend beyond such limits." * * *

" Whatever affects the peace, good order, morals and " health of the community comes within its scope; and every " one must use and enjoy his property subject to the restrictions " which such legislation imposes. *What is termed the police " power of the State, which from the language often used " respecting it, one would suppose to be an undefined and " irresponsible element in government, can only interfere with " the conduct of individuals in their intercourse with each other, " and in the use of their property, so far as may be required " to secure these objects.*"

In the very latest case, the Kansas prohibition cases, this Court said:—

" But by whom, or by what authority, is it to be determined " whether the manufacture of particular articles of drink, " either for general use or for personal use of the maker, will " injuriously affect the public? Power to determine such

" questions, so as to bind all, must exist somewhere; else " society will be at the mercy of the few, who, regarding only " their own appetites or passions, may be willing to imperil " the peace and security of the many provided only they " are permitted to do as they please. Under our system that " power is lodged with the legislative branch of the govern- " ment. It belongs to that department to exert what are " known as the police powers of the State, and to determine, " primarily, what measures are appropriate or needful for the " protection of the public morals, the public health, or the " public safety.

" It does not at all follow that every statute enacted " ostensibly for the promotion of these ends, is to be accepted " as a legitimate exertion of the police powers of the State. " There are, of necessity, limits beyond which legislation " cannot rightfully go. While every possible presumption " is to be indulged in favor of the validity of a statute, " (*Sinking Fund Cases*, 99 *U. S.*, 718,) the courts must " obey the constitution rather than the law-making depart- " ment of government, and must, upon their own respons- " ibility, determine whether, in any particular case, these " limits have been passed. 'To what purpose,' it was said " in *Marbury vs. Madison*, *Cranch*, 137, 167, 'are powers " limited, and to what purpose is that limitation committed " to writing, if these limits may, at any time, be passed by " those intended to the restrained? The distinction between " a government with limited and unlimited powers is " abolished, if those limits do not confine the persons on whom " they are imposed, and if Acts prohibited and Acts allowed " are of equal obligation.' "

" The courts are not bound by mere forms, nor are they to " be misled by mere pretenses. They are at liberty—indeed, " are under a solemn duty—to look at the substance of things, " whenever they enter upon the inquiry whether the legis- " lature has transcended the limits of its authority.

"If, therefore, a statute purporting to have been enacted "to protect the public health, the public morals, or the public "safety, has no real or substantial relation to those objects, "or is a palpable invasion of rights secured by the fund- "amental law, it is the duty of the courts to so adjudge, and "thereby give effect to the constitution."

"Whatever affects the peace, good order, morals and "health of the community comes within its scope; and every "one must use and enjoy his property subject to the restric- "tion which such legislation imposes. *What is termed the "police power of the State, which, from the language often "used respecting it, one would suppose to be an undefined and "irresponsible element in government, can only interfere with "the conduct of individuals in their intercourse with each "other, and in the use of their property, so far as may be "required to secure these objects.*"

People vs. Marx, 99 *New York*, 377.
Tenement House Cigar Case, 98 *New York*, 98.

"As a general proposition, it may be stated, it is in the "province of the law-making power to determine whether "the exigencies exist calling into exercise this (police) "power.

"What are the *subjects* of its exercise is *clearly a judicial "question.*"

Town of Lakeview vs. Rose Hill Co., 70 *Illinois*, 191.

In *Cooley's Constitutional Limitations*, 4th ed., page 719, the law is stated as follows:

"The limit of the exercise of the police power in these "cases must be this; the regulations must be in reference to "the comfort, safety and welfare of society; they must not be "in conflict with any of the provisions of the charter, and "they must not under pretense of regulation take from the "corporation any of the essential rights which the charter

"confers. In short, they must be police regulations in fact "and not amendments of the charter in curtailment or cor- "porate franchises."

In *Potter's Dwarris on Statutes*, page 458, the law is thus stated:

"The limit to the exercise of the police power can only be "this: the legislation must have reference to the comfort, the "safety or the welfare of society; it must not conflict with "the provisions of the constitution."

In *Austin vs. Murray* 16, *Pickering* 121, 126, the Supreme Court of Massachusetts said:

"The law will not allow the rights of property to be in- "vaded under the guise of a police regulation for the promo- "tion of health, when it is manifest that such is not the ob- "ject and purpose of the regulation."

In *Watertown vs. Mayo* 109, *Mass.* 315, 319, same Court said:

"The law will not allow rights of property to be invaded "under the guise of a police regulation for the preservation "of health or protection against a threatened nuisance; and "when it appears that such is not the real object and pur- "pose of the regulation the Courts will interfere to protect "the rights of citizens."

That all laws passed by the legislature are subject to review by the Courts to determine whether they are within the legislative power, and also whether they conflict with any constitutional restrictions.

See *McCullough vs. Maryland* 4, *Wheaton* 316, 421; *Hepburn vs. Griswold* 8, *Wallace* 603; *Legal Tender Cases* 12, *Wallace* 457; *Marbury vs. Madison* 1*st*, *Cranch* 137.

Aside from decided cases this point of law must be true. Suppose that a statute of Pennsylvania gives "A's" property to "B" and Pennsylvania calls it a police law, and such act is brought here for review on the ground that it does not fall within

the police power but is a flagrant violation of the provisions of the 14th amendment: Is it a satisfactory answer for this Court to have Pennsylvania say, but you cannot institute such an inquiry. The General Assembly of our State is the ultimate power and *if it* determines this act to be an exercise of the police power and necessary for the public health or morals the Courts (in language of the Pennsylvania Supreme Court in the Walker case) "*are bound to presume*" such are the facts.

That is, although the 14th amendment prohibited any State from denying to any one the equal protection of its law and depriving any one of life, liberty, or property without due process of law yet these constitutional restrictions really in the end depend on the form or manner of State Legislation. If the State dubs the Act attacked a police law and its General Assembly says it is to protect the public health or morals, that concludes the question and the courts are powerless to examine it.

This is utterly subversive of the constitutional prohibitions, contrary to the time honored judicial decisions that the fundamental law is placed in care of the courts and whenever the legislative department infringes any of its provisions the judiciary will declare such Act void. It is destructive of one of the most valuable protections to life, liberty or property.

The very purpose of the prohibitions in the 14th amendment was to prevent the State passing Acts which would deprive the individual of life, liberty or property without due process of law, but if each State can itself determine when such Act does or does not violate such prohibition, *cui bono*, the restriction?

In all other branches of legislative action the courts inquire of and test the legality of their acts by the constitution. Why should the police power be an exception? Where in any of the reserved rights of the people or in any of the constitutional provisions is it said that life, liberty and property are all subject to any Legislative Act which is called a Police power?

To affirm the broad doctrine of the Supreme Court of Pennsylvania is to place a large mass of legislation at the discretion of the legislature without any limit and freed from the restraining influences of the constitution, and to adopt such a rule for cases arising under the 14th amendment would be to render its beneficient provisions practically worthless.

(3.) *Oleomargarine butter is not injurious to the public health, morals or safety, and therefore its manufacture and sale cannot be prohibited under the guise of the police laws.*

We have seen under the preceding head that this Court will determine whether, or not, any given law of the State, including so-called police laws, are in conflict with the Federal Constitution. To do this it becomes necessary to determine primarily what the police power is, and in what way, if at all, oleomargarine butter offends the public health, morals or peace.

It is admitted that the police power of the State is a general supervisory power intended to promote the public health, peace, safety and morals. This Court in the *Slaughter House cases* 16*th* Wallace 62, defined it as follows:

"Unwholesome trades, slaughter-house operations offen-
"sive to the senses, the deposit of powder, the application of
"steam-power to propel cars, the building with combustible
"materials, and the burial of the dead may, says Chancellor
"Kent, be interdicted by law in the midst of dense masses of
"population on the general and rational principle that every
"person ought so to use his property as not to injure his
"neighbors, and that private interests must be made subservi-
"ent to the general interests of the community. This is called
"the police power; and it is declared by Chief Justice Shaw
"that it is much easier to present and realize the existence and
"sources of it than to mark its boundaries or prescribe the
"limits of its exercise. This power is and must be, from its
"very nature, incapable of any very exact definition or limi-
"tation. On it depends the security for social order, the
"health and life of the citizen, the comfort of an existence in

"a thickly populated community, the enjoyment of private "and social life and the beneficent uses of property. It ex- "tends, says another eminent Judge, to the protection of lives, "limbs, health, comfort and quiet of all persons and the pro- "tection of all property within the State; and persons and "property are subjected to all kinds of restraints and bur- "dens in order to secure the general comfort, health and pros- "perity of the State."

So in the *Beer Company vs. Massachusetts* 97 *U. S.* 33, this Court again said:

"Whatever difference of opinion may exist as to the ex- "tent and boundaries of the police power, and however diffi- "cult it may be to render a satisfactory definition of it, there "seems to be no doubt that it extends to the protection of "the lives, health and property of the citizens and to the pres- "ervation of good order and the public morals."

The police power springs from and is based upon the doctrine or maxim, *Sic utere tuo ut alienum non lædas.*

Cooley's Constitutional Limitations, Star page 574. *Fertilizing Co. vs. Hyde Park* 97 *U. S.* 667.

In *Munn vs. Illinois,* 94 *U. S.* 145, Justices Strong and Field agreed that:

"The power of the State over the property of the citizen "under the constitutional guaranty is well defined. * * * "The doctrine that each one must so use his own, so as not to "injure his neighbor—*sic utere tuo ut alienum non laedas*— "is the rule by which every member of society must possess "and enjoy his property. * * * Except in cases where "property may be destroyed to arrest a conflagration or the "ravages of pestilence, or be taken under the pressure of an "immediate and overwhelming necessity to prevent a public "calamity, the power of the State over the property of the "citizen does not extend beyond such limits." * * *

It would be useless to multiply citations on this question, and if additional authorities are required, reference is made to those cited in the cases named.

As seen it has for its objects the preservation of the public health, morals, peace and good order.

The law of Pennsylvania in question, approved May 21, 1885, is entitled "An Act for the protection of the public health and to prevent the adulteration of dairy products and fraud in the sale thereof."

According to this title the objects of the legislation then are (*a*) to protect the public health, (*b*) to prevent the adulteration of dairy products, (*c*) fraud in the sale thereof.

They all relate, however, to the public health, because the dairy products are articles of food.

How utterly useless this act would be in the prevention of the adulteration of Oleomargarine butter and fraud in the sale thereof, and how utterly misleading its entire title is, will be shown hereafter, but for the present it is assumed that it is an Act purporting to be in reference to the public health. If as a fact Oleomargarine butter is injurious to the public health, then it does come within the police power.

Admittedly the manufacture and sale of liquor does affect the public health and morals and the safety and good order of society, and therefore its regulation and control is admittedly within the police power of the State.

This Court has repeatedly said that it could not affect to be ignorant of the well-known fact that the manufacture and sale of liquor does affect the public morals, health and peace. All the past and all the present bear abundant proof of that. The records of our Criminal Courts, of our public and private hospitals, of our jails and all our reformatory institutions, furnish abundant proof of it. Nay more, the public press teems with the saddest of

crimes and suicides and heart-rending incidents traced to their source in the excessive use of liquor.

This knowledge of its effect crowded in upon you and every decision affirming that the regulation or prohibition of the traffic was within the police power of the several States was based on these well-known facts.

We need only refer to the last decision of this Court in the Kansas Prohibition cases, opinion by Mr. Justice Harlan, where the cases were reviewed and the doctrine affirmatively stated.

Just here it may be said, that if this Court took judicial notice or informed itself as to liquor, why may it not do likewise as to oleomargarine butter?

But the manufacture or sale or use of oleomargarine butter cannot be classed with liquor. It is separate and apart from it, and is as independent of and freed from the reasons which places liquor under the police laws, as is the purest and choicest wheat, bread and pure water. To demonstrate this the Plaintiff in error in this case offered to prove in the Court below (page 5) that the article sold to the prosecuting witness was manufactured in the presence of the witness on the stand; that it was made from pure animal fats; that the process of manufacture was clean and wholesome; that the article contains the same elements as dairy butter; that the only difference between them is that the manufactured article contains a smaller proportion of the fatty substance known as butterine; that this butterine exists in dairy butter in the proportion of from three to seven per cent., and in the manufactured article in a smaller proportion, and was increased in the manufactured article by the introduction of milk and cream; that this having been done the article contains all the elements of butter produced from pure unadulterated milk or cream from the same, except that the percentage of butterine is slightly smaller; that the only effect of butterine is to give flavor to the butter and has nothing whatever to do with its wholesomeness; that the oleaginous substances in the manufactured article are substantially identical with those produced from milk or

cream; that the article sold by the Defendant to the prosecuting witness was a wholesome and nutritious article of food and in all respects as wholesome and healthful as butter produced from pure unadulterated milk or cream from the same.

In the consideration of this case, this Court will assume this proof could have been made.—*Scotland vs. Hill*, 112 *U. S.* 186.

The case of the Commonwealth in the Court below was (page 5,) merely that the Defendant had sold:

"An article manufactured out of oleaginous substances and compounds other than that produced from unadulterated milk or cream from the same, and designed to take the place of butter produced from pure unadulterated milk or cream; that the said packages were sold and bought as 'butterine,' and not as butter produced from pure unadulterated milk or cream from the same."

And also that when the packages were sold they were each marked "Oleomargarine Butter."

There was no evidence of any kind given to show that oleomargarine butter was in any shape, manner or form injurious to the public health. There was no evidence of any kind to show any fraud practised by the Plaintiff in Error in the sale of the oleomargarine butter, but on the contrary, the case of the State admitted that the article was bought and sold as oleomargarine butter or butterine, and that it was stamped "Oleomargarine Butter."

In no shape, manner or form was it shown how oleomargarine butter could in any way harm any one, or how making it or having it for sale or selling it could injure any one. Especially was there an entire absence of proof to even suggest how oleomargarine butter could affect the public health *just when* and *only when* it was in *competition* with dairy butter, but was harmless if used as a substitute for aught else.

The Act in question does not say that oleomargarine butter is unwholesome, or in any way injurious to the public health, or morals, or peace.

Its title, "To protect the public health," may refer solely to the use of impure milk in making dairy butter.

There is nothing in any way or of any kind to show that oleomargarine butter does affect the public health, or peace, or good order.

The fact that oleomargarine butter is most extensively used in the country at large and of what it is made and what its ingredients are and whether wholesome or not, would seem to be matters of which this Court will inform itself.

Brown, et al, vs. Piper, 91 *U. S.*, 42.

The report of the Commissioners of the Internal Revenue for the fiscal year, ending June 30, 1887, contains on page CXLIV to page CLIII, an extended examination of oleomargarine butter from a scientific stand point, and the following is an extract from page CLII:—

> "The wholesomeness of artificial butter has been affirmed
> "by eminent chemists and physiologists, both in Europe and
> "in this country, who have devoted attention to this subject,
> "when it is prepared from carefully selected and sweet fat of
> "healthy animals, and the process conducted in a proper and
> "cleanly manner. (See in this connection the statements of
> "Dr. C. F. Chandler, of the School of Mines, Columbia
> "College, New York; Prof. Henry Morton, Stevens
> "Institute, Hoboken, N. J.; Prof. G. F. Barker, University
> "of Pennsylvania, Philadelphia; Prof. G. C. Caldwell,
> "Cornell University, Ithaca, N. Y.; Prof. S. W. Johnson,
> "Sheffield, Scientific School, Yale College, New Haven,
> "Conn.; Dr. J. W. S. Arnold, University Physiological
> "Laboratory, New York; submitted to the Senate Com-
> "mittee Agriculture and Forestry, and by Sir F. A. Abel,
> "Mr. Herbert P. Thomas, Mr. A. H. Allen, President of
> "the Society of Public Analysts; Mr. Otto Hehner,
> "Secretary of the Society of Public Analysists; Dr. James
> "Bell, principal analyzer to the Commissioners of Inland
> "Revenue, and others before the English Committee.)"

The case is then free from all elements of fraud.

Oleomargarine butter is an article whose use does not injuriously affect the public health, or morals, or peace, or good order.

It is a healthful, wholesome and nutritious article of food in no way injurious to the public health, morals or peace.

So this record stands. So the Supreme Court of Pennsylvania assumed it to be when it said that this fact is irrelevant and immaterial.

So all the Standard Scientific Works will show.

If oleomargarine butter be such an article ; if it is wholesome and pure, and its use does not, in any way, affect the public health, may the legislature of the State, under the pretense of the police power, prohibit its manufacture, or sale, or possession with the intent to sell?

If it be said the legislature may so interfere, we respectfully ask upon what grounds can such an interference be justified? Acts passed under the police power should have some relation to the public health, peace, good order, or morals.

As was said in the Kansas prohibition cases such laws must have some *real and substantial relation* to the *public health, morals,* or *good order.*

> " A law enacted in the exercise of the police power, must
> " in fact be a police law. If it be a law for the promotion
> " of the public health, it must be a health law having some
> " relation to the public health."

In Re Jacobs 98, *N. Y.* 112.

> " But acts which can only be justified on the ground that
> " they are police regulations, must be so clearly necessary to
> " the safety, comfort or well being of society, or so imper-
> " atively required by the public necessity that they must be

"taken to be impliedly excepted from the words of the con-
"stitutional prohibition."

2 *Kent's Com.* * 340, *note* 2, (13*th ed.*)
State vs. Noyes 47, *Maine* 189.
People vs. Jackson and M. P. R. Co. 9, *Michigan* 307.

If the legislature pass an Act entitled, "An Act to protect the public health and morals," and the substance of the Act was to give "A's" property to "B," could it be pretended that this was a lawful exercise of the police power of the State?

While it is not denied that the police power is part of the legislative functions of the government and that in cases falling legitimately within its scope, legislative discretion may be exercised as to the reasonable extent of the penalty, it is denied that the legislature can bring any given article within the police power, merely by passing an Act of Assembly and saying that it does affect the public health, or peace, or good order, or morals.

Primarily all the Acts of the legislature are valid. The Courts so presume. Because of this *primarily* a police law is valid. But this is *primae facie* only. If from an analysis of the Act or from proof offered, or by the Court acquainting itself with the facts, it is shown the Act has no real or substantial relation to the public health, peace, or morals, it is not a valid exercise of the police power.

If in any definite and satisfactory way, as by an offer as was made in this case on a judicial trial, or from information gained directly by this Court, it appears that the thing sought to be brought within the police power, is not as a fact within it; that is if the legislature pretend to prohibit the sale of an article as deleterious to health, when as a fact it is not deleterious to health, and this plainly and legitimately appears, and there is even no dispute in reference to it, then it would be the duty of the Courts to say that it was not a legitimate exercise of the police power.

As was said by the Court of Appeals of the State of New York in the matter of *Jacobs* 98 *New York, page* 115 :—

> " When a health law is challenged in the Courts as " unconstitutional, on the ground that it arbitrarily interferes " with personal liberty and private property without due " process of law, the Courts must be able to see that it " *has in fact some relation to the public health, that the public* " *health is the end actually aimed at, and that it is appropriate* " *and adapted to the end.*"

As this Court in the Kansas prohibition cases, after premising that the police power belonged to the legislative department of government, said :—

> " It belonged to that department to exert what are known " as the police powers of the State, and to determine primarily " what measures are appropriate or needful for the protection " of the public morals, the public health or the public safety. " *It does not at all follow that every statute enacted ostensibly for* " *the promotion of these ends, is to be accepted as a legitimate* " *exercise of the police powers of the State.* There are of neces- " sity limits beyond which legislation cannot rightfully go.
>
> " While every possible presumption is to be indulged in " favor of the validity of a statute (*Sinking Fund cases* 99, " *U. S.* 718) the courts must obey the Constitution rather " than the law-making department of government, and must " upon their responsibility determine whether, in any par- " ticular case, these limits have been passed. ' To what pur- " pose,' it was said in *Marbury vs. Madison* 1, *Cranch* 137, " 167, are powers limited, and to what purpose is that limi- " tation committed to writing if these limits may, at any " time, be passed by those intended to be restrained? The " distinction between government with limited and unlim- " ited powers is abolished, if those limits do not confine the " persons on whom they are imposed, and if acts prohibited " and acts allowed are of equal obligation. The Courts are " not bound by mere form nor are they to be misled by

" mere pretenses. They are at liberty, indeed are under a
" solemn duty, to look at the substance of things whenever
" they enter upon the inquiry whether the legislature has
" transcended the limits of its authority.

" *If, therefore, a statute purporting to have been enacted to*
" *protect the public health, the public morals or the public*
" *safety, has no real or substantial relation to those objects,* or
" is a palpable invasion of the rights secured by the funda-
" mental law, it becomes the duty of the Courts to so ad-
" judge and thereby give effect to the Constitution."

It is not intended to deny that the Legislature of the State may protect the adulteration of all food products. It may prevent the adulteration of wheat flour. It may regulate the adulteration of wheat or rye bread, of molasses, sugar, rye, salt, pepper and all the articles of food which are used to sustain life. So it may regulate the adulteration of oleomargarine butter and milk, and undoubtedly it may prohibit the adulteration of milk by the introduction of water and we find no fault with the decision of the Supreme Court of Massachusetts, (*Commonwealth vs. Farron*, 91, *Mass.* 489), referred to in the opinion of the Court in this case, sustaining an act prohibiting the adulteration of milk by the introduction of water. This was purely a case of adulteration or weakening of a dairy product useful and beneficial to human life. But the Supreme Court of Massachusetts did not hold that the legislature might prohibit the sale of pure milk or pure water.

It is one thing to regulate the adulteration of an article, or to prevent fraud in the manufacture or sale thereof, and quite another thing to absolutely prohibit the manufacture or sale of the article itself.

Is it possible that the legislature of Pennsylvania, or of any other State in the Union, may prohibit the manufacture and sale of wheat flour and wheat bread, or rye bread, or dairy butter, or sugar, or cream, or milk, or any of the articles of food which are

necessary to sustain human life. May they indeed prohibit the sale of water or milk in its pure state?

Is not the question answered by the asking of it, that such an Act would be depriving the citizen of his liberty and in many cases property, and indeed in some cases life, without due process of law.

But if such a prohibition is unconstitutional as to wheat bread, or rye bread, or flour, or any wholesome or nutritious article of food which the citizens of the State use, by what mode of reasoning can the constitutionality of an Act such as the one in question be sustained when the facts as they now appear to this Court show that oleomargarine butter is just as healthful an article of food as wheat flour, or bread, or rye, or milk, or dairy butter?

If it is not within the police power to prohibit the sale of wheat bread and rye bread, milk and cream, and dairy butter, etc., how can it be within the police power to prohibit the sale of an article equally wholesome?

There is not an article of food that we eat that may not be and which probably is not, at some time or by some person adulterated. But because this is so may all honest dealers be prevented from making or selling a pure, honest article because some dishonest ones adulterate?

Is the honest baker to lose his occupation and property because a dishonest one adulterates bread? If so, truly the law punishes the innocent. The many honest suffer for the few dishonest, and the baker holds his liberty and property subject to be taken from him *because*—and *only because*—a man he never knew or helped to be dishonest adulterates bread. Surely this cannot be. Federal constitutional restrictions are not so futile and useless.

We invite the fullest investigation as to what oleomargarine butter is? Whether it is wholesome, or not. How it is made? What its ingredients are? How this Court will do this, is a matter within its discretion.

We admit to the fullest extent that the police power may prevent adulterations and may prevent fraud, yet, an examination of the Act in this case will show that there is not a syllable in the Act in any way calculated to prevent fraud in the sale of or to prevent the adulteration of oleomargarine butter. It is simply and solely aimed at the extinction of the oleomargarine traffic, and if the Act was enforced to its fullest extent it could in no shape, manner or form prevent fraud in or prevent the adulteration of oleomargarine. This Court will look at the substance of the Act and will not be deceived merely by the pretence in the title.

We therefore submit, that this Pennsylvania Act which prohibits the manufacture and sale of oleomargarine is not a valid exercise of the police power of the State.

But if it is not, is it in conflict with any of the provisions of the Federal Constitution, and we reply that it is in conflict with the 14th amendment to the Federal Constitution, which is as follows:

> " All persons born or naturalized in the United States and
> " subject to the jurisdiction thereof, are citizens of the United
> " States, and of the State wherein they reside. No State
> " shall make or enforce any law which shall abridge the
> " privileges or the immunities of the citizens of the United
> " States; nor shall any State deprive any person of life,
> " liberty or property without due process of law, nor deny
> " to any person within its jurisdiction the equal protection of
> " the law."

The Act of May 21, 1885, *is in conflict with this amendment in the following particulars:*

> (IV.) *In that it denies to the Plaintiff in Error, a person within the jurisdiction of the State of Pennsylvania, the equal protection of the laws of the State.*

The title and the first section of the Act of May 21, 1885, are as follows:

"An Act for the protection of the public health and to "prevent adulteration of dairy products and fraud in the sale "thereof."

"SECTION 1. Be it enacted, &c., That no person, firm or "corporate body shall manufacture out of any oleaginous "substances or compounds of the same, other than that pro- "duced from unadulterated milk or of cream from the same, "any article *designed to take the place of butter or cheese* pro- "duced from pure undulterated milk or of cream from the "same, or of any imitation or adulterated butter or cheese; nor "shall sell or offer for sale or have in his, her or their posses- "sion with intent to sell the same as an article of food."

The title of this Act says the Act is

(A,) To protect the public health, (B) to prevent adulteration of dairy products, and (C) fraud in the sale of dairy products.

The first section contains the legislative prohibition. It denies the right of all persons to manufacture or sell, or offer for sale, or have in their possession with the intent to sell any article "manufactured out of oleaginous substances or compounds of the same other than that produced from unadulterated milk or of cream from the same any article *designed to take the place* of butter or cheese produced from pure unadulterated milk or of cream from the same."

It does not prohibit the manufacture or sale of the same oleaginous compounds, *provided*, such a compound could be used for *any other purpose than as a substitute for butter or cheese.* If the compound or oleaginous substance could be used as a substitute for meat, or bread, or sugar or coffee, or lard the Act does not prohibit its manufacture or sale.

It prohibits the manufacture or sale when, and only when, in the words of the Act it is "*designed to take the place of* butter or cheese produced from pure unadulterated milk or of cream from the same."

It is legislation which strikes down and prevents the manufacture and sale of an article which on the market may be used as a substitute for another food product. When, and just when, and not until, the product IS DESIGNED to take the place of dairy butter and to be used as a substitute for it, its manufacture or sale, or having in possession with intent to sell becomes a crime and is prohibited by the Act.

This legislation then prohibits all persons engaged in the manufacture or sale of Oleomargarine butter, from engaging in it, or offering the Oleomargarine butter for sale, or selling it as a substitute for dairy butter.

This analysis of the Act seems clearly to demonstrate the following propositions:

(A.) That the title of the Act is false and misleading so far as this case is concerned, when it says it is to protect the public health.

Oleomargarine butter is a food product. It is or it is not deleterious to the public health as such product. The other food product with which it competes and instead of which it is used cannot change the nature or effect upon health of Oleomargarine butter. If the manufacture and sale, or having for sale, Oleomargarine butter as a substitute for beef, or lard, or bread, would not affect the public health, how is it possible that the purpose for which it is offered for sale can determine the question of its healthfulness? However sold, or for whatever purpose it is to be used by the citizens, it is a food product and intended as an article of food. If it is sold as a substitute for bread or meat, then, according to the Act, it is not illegal or unwholesome. If it is sold as a substitute for butter, it is illegal and unwholesome. If the Legislature of the State cannot make black white, nor day night, surely it cannot, by mere legislative declaration, effect such a change as this. It surely does not protect the public health *merely* to prevent the sale of one wholesome article *only* when it is designed to take the place of one other article of food with which it competes.

(B.) In no shape or form does the Act prevent the adulteration of Oleomargarine butter.

It is not aimed against the adulteration of Oleomargarine. When in its title it says, *the purpose of the Act is, among other things, to prevent the adulteration of dairy products,* it states that which the words of the Act shows to be false so far as Oleomargarine is concerned.

(C.) Nor does the Act in any way provide means to prevent fraud in the sale of Oleomargarine.

When the title of the act says that one of its purposes *is to prevent fraud in the sale thereof,* it states again that which the letter of the Act proves to be untrue so far as Oleomargarine is concerned.

In so far as the Act prevents the adulteration of milk or cream used in the making of butter we have no contention with it, but the fact that the same Act which merely prevents *the adulteration* of dairy butter, absolutely prevents the manufacture or sale of its substitute, Oleomargarine butter, points and emphasizes the truth of our criticism of the Act.

Stripped of its pretenses and shown in its nakedness, this Act, then, is an Act favoring dairy butter and those engaged in its production and sale, at the expense of Oleomargarine butter and those engaged in its manufacture and sale.

When stated conversely, it is an Act prohibiting the manufacure and sale of Oleomargarine butter for the purpose of furthering the manufacture and sale of butter produced from milk or cream.

This plainly appears upon the face of the Act.

It really in truth and in fact has no relation to the public health, nor has it any relation to the prevention of fraud in the sale of, or the adulteration of Oleomargarine. Its purpose is plainly to prevent the sale of Oleomargarine butter *because* and *only* because the purchaser takes it instead of the dairy butter—

else why does the Act say it is only when it is designed to take the place of butter its sale is unlawful. There can be no pretense that Oleomargarine is unhealthy. The Act does not say it is. No proof was offered to show it is. The proof is just to the contrary.

What does the Fourteenth Amendment mean when it says that no State shall deny to any one the equal protection of its laws?

In *Ex parte, Virginia*, 100 *U. S.* 340, this Court held that where a colored man in Virginia was charged with the commission of a crime that he was entitled to a jury indifferently selected, or chosen without discrimination as to color and that an Act for the enforcement of the law providing for the summoning of the jury and excluding therefrom persons of color was in conflict with this clause of the Fourteenth Amendment in that it denied to him, the prisoner, the equal protection of the law within the Fourteenth Amendment. This Court said, (page 347.)

> "But the Constitutional Amendment was ordained for a "purpose. It was to secure *equal rights* to all persons and "to insure to all persons the enjoyment of such rights, power "was given to Congress to enforce its provisions by appro- "priate legislation."

To the same effect see *Strauder vs. West Virginia* 100 *U. S.* 303. *Virginia vs. Rives* 100 *U. S.* 313.

Neel vs. Delaware 103 *U. S.* 307.

In the Civil Rights cases, 109 *U. S.*, pages 23 and 24, Mr. Justice Bradley, delivering the opinion of the Court, said :

> "Many wrongs may be obnoxious to the prohibitions of "the Fourteenth Amendment which are not in any just sense "incidents or elements of slavery. Such, for example, would "be the taking of private property without due process of "law; or allowing persons who have committed certain

"crimes, (horse stealing, for example) to be seized and hung "by the *Posse Committatus* without regular trial; or deny- "ing to any person or class of persons the right to pursue "any peaceful avocation allowed to others. What is called "*class legislation would belong to this category and would be* "*obnoxious to the prohibition of the Fourteenth Amendment.*

* * * * * *

In *Yickwo vs. Hopkins* 118 *U. S.* 356, this Court declared that an ordinance of the city of San Francisco which was so enforced that it discriminated against the subjects of the Emperor of China and in favor of the American citizen in carrying on the laundry business was in conflict with the Fourteenth Amendment and void. In that case on page 367 this Court approvingly cited the language already used in the case of *Barbier vs. Connoly* 112 *U. S.* 27, that the Fourteenth Amendment was:

"Undoubtedly intended not only that there should be no "arbitrary deprivation of life or liberty, or arbitrary spoli- "ation of property but that equal protection and secur- "ity should be given to all under like circumstances in "the enjoyment of their personal or civil rights; that all "persons should be equally entitled to pursue their happiness "acquire and enjoy property; that they should have like "access to the Courts of the country for the protection of "their persons and property, the prevention and redress of "wrongs and the enforcement of contracts; *that no impedi-* "*ment should be interposed to the pursuits of any one except as* "*applied to the same pursuits by others under like circum-* "*stances;* that no greater burdens should be laid upon one "than are laid upon others in the same calling and condition; "and that in the administration of criminal justice no differ- "ent or higher punishment should be imposed upon one than "such as is prescribed to all like offenses."

It was further said:

"*Class legislation* discriminating against some and favor- "ing others is prohibited, but legislation which in carrying

"out a public purpose is limited in its application if within "the sphere of its operation it affects alike all persons simi- "larly situated is not within the Amendment."

If then this Pennsylvania Act is "class legislation"—or if it substantially denies to those who trafficked in Oleomargarine butter the equal protection of the law with those who trafficked in dairy butter, it is in conflict with the Fourteenth Amendment. What are the facts? There are two ways of making butter:

DAIRY BUTTER.

Hundreds of citizens were engaged in its manufacture by the process hereinbefore described, which (1) extracted from the cow her secretion called milk, and (2) artificially treated this milk to extract from it the oil which when (3) artificially treated and mixed with salt, arnatto, etc., resulted in the product called Dairy Butter. The choicest product was toothsome but expensive, and until its rival was made and sold it had practically no competition.

OLEOMARGARINE BUTTER.

Hundreds of citizens were engaged in its manufacture by the process described, which (1) took from the beef its fleshy fat and (2) artificially treated this until from it was extracted the oil which, when (3) treated as the oil extracted from milk resulted in the product called Oleomargarine Butter. It was substantially the same product as Dairy Butter, and equally wholesome, but not so pleasant to the taste as the choicest brands of Dairy Butter. It was much better than inferior grades of Dairy Butter, and was much cheaper. It was the only real competition Dairy Butter had.

As we have seen the State Pennsylvania passed an Act by which, (1) it absolutely prohibited the manufacture or sale of oleomargarine butter when used or offered as a substitute for dairy butter and, (2) it in no way restricted the sale of dairy butter, but merely provided against its manufacture from impure milk or cream.

While the act protected the dealer in dairy butter from competition, it wholly prohibited all persons from making or selling oleomargarine butter, and this without any reason whatever except as appears from the face of the Act, because it was used as a substitute for dairy butter.

Is not this as decidedly class legislation as Yick Woo's case. Does not the State of Pennsylvania deny to dealers in oleomargarine butter the right it secures to the dealers in dairy butter? Does it not protect and foster the industry of dairy butter, and strike down and prohibit the industry of oleomargarine butter? Is it not denying to dealers in oleomargarine butter the equal protection of the laws with the dealers in dairy butter? It is certainly not giving to dealers in oleomargarine butter the protection of equal laws? It deprives them of their business and occupation, and it does so on the face of the statute itself, *because, and only because* the product dealt in is "*designed to take the place of butter or cheese.*"

The 14th amendment says that a State shall not deny to any one the equal protection of its laws. Not merely the "protection," but the "equal" protection. To equally protect "A" with "B," "A" must not be discriminated against. The law which says to "B" you may manufacture and sell butter, but must not make it from adulterated milk, and which in the same section says to "A" you *must not* manufacture or sell oleomargarine butter in competition with dairy butter, does not bear equally on "A" and "B." It strikes down "A"'s business. It furthers and protects "B"'s, and this at "A"'s expense. This cannot be the equal protection spoken of in the constitution. To make it legal some good reason affecting the public health must intervene. In this case none does so intervene.

In the construction of the language: "Nor deny to any person within its jurisdiction the equal protection of the laws," its context should not be overlooked.

The whole paragraph is this:—

"No State shall make or enforce any law which shall "abridge the privileges or immunities of the citizens of the "United States, nor shall any State deprive any person of "life, liberty, or property, without due process of law, *nor* "deny to any person within its jurisdiction the equal protec- "tion of the laws."

Now this clause as to *equal protection of the laws* immediately follows the clause protecting life, liberty and property and it is connected with it by the disjunctive "*nor*"—

The *equal protection* is broader than the protection of life, liberty, or property. A man possibly may be denied the equal protection of laws and yet not in a technical sense be deprived of his liberty, or property.

The denial is of the "*laws*" of the State. All of them. No system of legislation shall be adopted which shall operate or bear more harshly on "A" than on "B," unless indeed "A"'s own misconduct causes the difference.

Merely calling a law which denies the equal protection, "a police law" will not relieve it from the condemnation of the constitution.

In *Strauder vs. West. Virginia*, 100 *U. S.* 310, this Court said:—

"The 14th amendment makes no attempt to enumerate the rights it was designed to protect. It speaks in general terms and those are as comprehensive as possible. Its language is prohibitory but every prohibition implies the existence of the rights and immunities, prominent among which is an immunity from *inequality of legal protection*, either for life, liberty or property."

In *Barbier vs. Connoly*, 113 *U. S.*, 31:

"The 14th amendment in declaring that no State should deprive any one of life, liberty or property without due process of

law, or deny to any one the equal protection of the law, undoubtedly intended that there should be no deprivation of life or liberty, or spoliation of property, but that *equal protection* should be given to all under like circumstances in the enjoyment of their personal and civil rights. * * * *That no impediment should be interposed to the pursuits of any except as applied to similar pursuits by others under like circumstances.*"

In *Boyd vs. United States*, 116 *U. S.*, 35:

"The rule is that constitutional provisions for the security of persons and property shall be liberally construed."

In the *Slaughter House cases*, 16*th Wallace, on page* 97, Mr. Justice Field said:

> "That amongst the things which the citizen have of right
> " 'must be placed the right to pursue a lawful employment in a
> " lawful manner without other restraint than such as *equally*
> " *affects all persons.*' "

While it is not claimed that technically this Pennsylvania Act creates a monopoly, its tendency is toward that and this affords an additional reason why it is in conflict with the 14th amendment.

If it is once admitted that the police power will enable the legislature at its option to prohibit the manufacture and sale of a harmless, wholesome article of food, when it is designed to take the place of another wholesome article of food, it opens wide the door to the interference by legislation with commerce and trade in order that one industry may flourish at the expense of another.

Why may not the dealers in oleomargarine butter if they could procure sufficient influence, have passed an act to prohibit the manufacture and sale of dairy butter; or the dealers in rye bread prohibit the making and sale of wheat bread; or the dealers in brown bread prohibit the making and sale of white bread; one kind of potatoes, or apples, or grapes, or peaches, or molasses, or sugar, or tea, or coffee, or tobacco, *et ad infinitum*, severally be

protected by prohibiting the sale of anything to be used as its substitute.

The effect of such legislation is to strike at the independence and thrift of the individual and to change our theory of government; the personal liberty of the citizen, and his responsibility to himself for his own success in life is weakened, and he becomes a member of a paternal government which makes or ruins him as no King or Queen in Europe has dared to do for one hundred years.

It is in conflict with the doctrine of equity before the law and is a denial of equal privileges to all.

See the *Slaughter House Cases*, 16 *Wallace* 62; *Charles River Bridge vs. Warren Bridge*, 11 *Peters*, 607; *Case of the Monopolies*, 11 *Report*, 84; *Cooley's Principles of Com. Law, page* 325; *Butchers' Union vs. Crescent City Co.*, 111 *U. S.* 746, 754, 761.

Nor should it be overlooked that if it is lawful for the legislature to so prohibit the manufacture or sale of any or all harmless food products, the further consequence follows, that the articles of food which the individual may eat are directly controlled by the State. The theory of our government is not paternal, but that the greatest freedom consistent with the public good should be given the citizen, and yet such legislation seems to greatly limit his freedom and only because others may have an exclusive market for a peculiar food.

We submit the Act of May 21st, 1885, most unequally affects the Plaintiff in error and others engaged in the manufacture and sale of oleomargarine butter for the benefit ot those engaged in the manufacture of dairy butter from milk or cream, and therefore is unconstitutional:

> (IV) *The Act of May 21st, 1885, is also in conflict with the 14th amendment, because it deprives Powell, the Plaintiff in error, of his liberty without due process of law.*

What is the liberty which the constitutional amendment was intended to protect? There is no limitation of it. It is not

merely absence of bodily restraint and freedom from incarceration, but "liberty" in its most comprehensive sense.

The primary definition of the word is given by Webster as follows: "The state of a freeman; ability to do as one pleases." It includes civil and political, and social and personal liberty.

Blackstone says, vol. 1, page 125:

"Civil liberty is that of a member of society and is no other than natural liberty so far restrained by human laws (and no further) as is necessary and expedient for the general advantage of the public."

In the case of the *Monopolies, 11th Coke, page* 4, it was said:

"All avocations, as well mechanical as otherwise, which prevents idleness (the bane of the Commonwealth) and exercises men and youth in labor for the maintenance of themselves and of their families and for the increase of their substance to serve the queen as occasion shall require, are profitable for the Commonwealth, and, therefore, the grant to the Plaintiff to have the sole making of them (playing cards) is against the common law and the benefit and labor of the subject."

In *Cooley on Constitutional Law, page* 225, the author says:

"Life and Liberty! These words are used in constitutional law as standing for and representing all personal rights whatsoever, except those which are embraced in the idea of property. The comprehensive word is "liberty" and by this is meant not merely the freedom to move by unrestraint but such liberty of conduct, choice and action as the law gives and protects."

And again on page 231:

"The general rule is that every person *sui juris*, has a right to choose his own employment and to so fit his labor to any calling, or at his option to hire it out to the service of others. This is one of the highest of civil rights and any restrictions that discriminate against persons or classes are inadmissible."

In *Story on Constitutional Law, Cooley's edition, section* 1950, the author says:

"The word we employ to comprehend the whole is not, therefore, a mere shield to personal liberty, but to civil liberty, and to political liberty also, so far as it has been conferred and possessed. It would be absurd, for instance, to say that arbitrary arrests were forbidden, but that the freedom of speech, the freedom of religious worship, the right of self-defense against unlawful violence, the right freely to *buy and sell as others may*, or the right in the public schools found no protection here. * * * * The word on the other hand embraces all our liberties—personal, civil and political. None of them are to be taken away except in accordance with established principles; none can be forfeited, except upon the finding of legal cause after due inquiry."

In the *Slaughter House cases*, 16 *Wall.*, 116, Mr. Justice Bradley said:

"The rights to life, liberty and the pursuit of happiness are equivalent to the rights of life, liberty and property. * * * For the preservation, exercise and enjoyment of these rights the individual citizen as a necessity must be left free to adopt such calling, profession or trade as may seem to him most conducive to that end. Without this right he cannot be a freeman. This right to choose one's calling as an essential part of that liberty which it is the object of government to protect and the calling when chosen is a man's property and right. Liberty and property are not protected when these rights are arbitrarily assailed."

In the same case, page 97, Mr. Justice Field said:

> "That amongst the things which the citizen has of right, must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons."

In the *Butchers' Union vs. The Crescent City Company*, 111 *U. S.*, 761, Justice Bradley, Harlan and Woods agreed that:

"The right to follow any of the common occupations of life is an inalienable right."

Mr. Justice Field, in the same case, page 757, said: "The common business and callings of life, the ordinary trades and pursuits which are innocuous in themselves and have been followed in all communities from time immemorial, must therefore be free in this country to all alike upon the same conditions."

In *Munn vs. Illinois*, 94 *U. S.*, 142, Mr. Justice Strong and Field held that:

"By the term 'liberty,' as used in the provision, something more is meant than mere freedom from physical restraint or the bonds of a prison. It means freedom to go where one may choose and to go in such a manner not inconsistent with the equal rights of others, as his judgment may dictate, for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities and to give to them their utmost enjoyment."

The New York Court of Appeals in *People vs. Marx*, 99 *New York* 386, states:

"These constitutional safeguards have been so thoroughly discussed in recent cases that it would be superfluous to do more than refer to the conclusions which have been reached bearing upon the question now under consideration. None of these propositions is now more firmly established than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuits not injurious to the community as he may see fit. * * * The term 'liberty' as protected by the Constitution is not cramped into a mere freedom from physical restraint of the person of the citizen, and incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare."

It will be noticed that this liberty of the citizen is not only his right to continue in any trade, occupation or profession he has chosen, but also *to choose* such trade, occupation or profession which he prefers. Whenever any given act denies this to him, and does so without cause, it deprives him of the liberty of choice, which the cases cited show is one of the things which by the 14th amendment he cannot be deprived of, except by due process of law.

The liberty, then, of Powell was the choice of his vocation in life, and amongst others he choose to purchase and sell oleomargarine butter. It was, and is, as we have seen, an article of food. It is wholesome and nutritious. The dealing in it injured neither the public morals nor the public safety, nor the public health.

It was a source of profit to him and was a means of livelihood.

Yet this avocation of Powell's is absolutely prohibited by the quoted Act. It says that no person shall either manufacture or sell or have in his or her or their possession with intent to sell the same (oleomargarine), if such manufactured product is intended as a substitute for dairy butter. There is no provision in any shape or form in the Act by which the question of the healthfulness and wholesomeness of the product and the harmless nature of the avocation can be tested. *Without any such examination or investigation the whole trade is stricken down.*

The offer of proof which the Court below said was irrelevant and immaterial was to show that the trade was wholesome and that oleomargarine was as healthful as dairy butter. It is obvious that if this legislation is sustained Pennsylvania is permitted to say that persons engaged in the manufacture and sale of oleomargarine butter shall no longer continue therein, and this notwithstanding the fact that the manufacture and sale of it is a peaceful and harmless avocation which Powell, the Plaintiff in error, and others were pursuing as a means of obtaining a livelihood.

Without any evidence that the avocation was unhealthful or unwholesome, or tended in any way to debauch the public morals or endanger the public health or safety, the purchase or sale of oleomargarine is absolutely prohibited when it comes in conflict with the sale of dairy butter. Of course this means a total prohibition because it is an oily substance used as a substitute for butter.

It is obvious that this Act deprives Powell of his avocation or calling in life.

Is the manner of this deprivation "due process of law?"

It would be useless to review all the cases in this Court and elsewhere defining what is due process of law, but we follow the intimation of this Court to deal with each particular case as it arises, and without attempting a general definition, we state with confidence, under the rulings of this Court, the proposition that a mere legislative rescript such as this, is not due process of law. Without providing for any *real* judicial trial it makes the Courts the mere instrument of the legislature by which to inflict penalties and punishments, because, and only *because*, the legislature has said so. No place is left for judicial discretion; no opportunity is given the accused to show that his liberty and property is causelessly taken from him. There is not any provision for the observance of the general rules which Courts have established for the protection of personal liberty and private property.

In *Murray's Lessee vs. Hoboken Land Company*, 18 *Howard*, 276, Mr. Justice Curtis, in considering the meaning of these words, said:

> "The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judical powers of the government,

and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will."

In *Davidson vs. New Orleans*, 96 *U. S., page* 102, Mr. Justice Miller said:

"It is easy to see that when the great Barons of England wrung from King John at the point of the sword the concession that neither their lives nor their property should be disposed of by the crown except as provided by the law of the land they meant, by the law of the land, the ancient customery laws of the English people, or laws enacted by parliament of which these Barons were a controlling element. It was not in their minds therefore to protect themselves against the enactment of laws by the parliament of England. But when in the year of grace 1866, there is placed in the Constitution of the United States, a declaration that 'no State shall deprive any person of life, liberty or property without due process of law, *can a State make anything due process of law which by its own legislation it chooses to declare such.* To affirm this is to hold that the prohibition of the States is of no avail, or has no application where the invasion of private rights is affected under the forms of State legislation. * * * But apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive and satisfactory, there is wisdom, we think, in the ascertaining of the intent of the application of such an important phrase in the Federal Constitution by the gradual process of judicial inclusion and exclusion as the case presented for decisions shall require with the reasoning on which such decisions may be founded." * * *

In the same case, page 107, Mr. Justice Bradley said:

"I think therefore we are entitled under the Fourteenth Amendment, not only to see that there is some process of law, but 'due process of law' provided by the State law, when a citizen is deprived of his property; and that in judging what is due process of law, respect must be had to the cause

and object of the taking whether under the taxing power, the power of eminent domain or the power of assessment for local improvements or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law.'"

In *Hagar vs. The Reclamation District* 111, *U. S.* 707, Mr. Justice Field said:

> "It is no doubt wiser, as stated by Mr. Justice Miller in *Davidson vs. New Orleans* to arrive at its meaning by the gradual process of judicial inclusion and exclusion as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.

"It is sufficient to observe here, that by "due process" is meant one which following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; *and whenever it is necessary for the protection of the parties it must give them an opportunity to be heard respecting the justice of the judgment sought.* The clause in question means therefore that their can be no proceeding against life, liberty, or property which may result in the deprivation of either without the observance of those general rules established in our system of jurisprudence for the security of private rights."

In *Hertudo vs. California*, 110 *U. S. L.* 531, Mr. Justice Matthews says:

> "Due process of law in spite of absolutism of continental governments is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, which has given us that fundamental maxim of distributive justice—*suum cuique tribuere.* There is nothing in the Magna Charta rightly construed as a broad charter of public right and law which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from

every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary we should expect that the new and various experiences of our own situation and system will mould and shape into new and not less useful forms. * * * The natural and obvious inference is that in the sense of the constitution due process of law was not meant or intended to include *ex vi termini* the institution and procedure of a grand jury in the case. The conclusion is equally irresistible that when the same phrase was employed in the Fourteenth Amendment to restrain the action of a State it was used in the same sense and with no greater extent and that if in the adoption of that amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the States it would have embodied as did the Fifth Amendment express declarations to that effect. Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon it by the Constitution of the United States, exercised within the limits therein prescribed and interpreted according to the principles of common law. In the Fourteenth Amendment by parity of reasoning it refers to that law of the land in each State which derives its authority from the enumerated and reserved powers of the State exerted within the limits of these fundamental principles of liberty and justice which allow at best of our civil and political institutions and the greatest security of which resides in the right of the people to make their own laws and alter them at their pleasure."

In *Dartmouth College case, 4th Whea'*, 510, Mr. Webster's celebrated definition was:

"By the law of the land is more clearly identified the "general law, a law which hears before it condemns, which "proceeds upon inquiry and renders judgment only after "trial. The meaning is that every citizen shall hold his "life, liberty or property or immunities under the protection "of the general rule which governs society. Everything

" which may pass under the form of an enactment is not " therefore to be construed the law of the land."

A legislative enactment, therefore, is not in all cases due process of law.

Admitting the enactment to be under the guise of the police power of the State it is not necessarily a police law merely because the legislature have said so. If it is not a police law, properly speaking; if it does not in fact legislate in reference to the public health, peace, good order or comfort, or safety, but is an insidious attack under the guise of such legislation upon the rights of a citizen, it cannot be due process of law. If it has no real and substantial relation to the public health, but strikes down the harmless avocation of one citizen because it comes in competition and conflict with that of another, it is a legislative rescript.

This Act leaves nothing for judicial discretion or investigation. The Court is powerless and can only register the legislative decree.

This Court in the Kansas Prohibition cases said:

> "It is said that by the 13th section of the Act of 1885, the Legislature, finding a brewery within the State in actual operation, without notice, trial or hearing, by the mere exercise of its arbitrary caprice, declares it to be a common nuisance, and there prescribes the consequences which are to follow inevitably by judicial mandate required by the statute, and involving and permitting the exercise of no judicial discretion or judgment; that the brewery being found in operation the Court is not to *determine* whether it is a common nuisance, but under the command of the statute is to *find it* to be one; that it is not the liquor made, or the making of it, which is thus enacted to be a common nuisance, but the place itself, including all the property used in keeping and maintaining the common nuisance; that the judge having thus signed without inquiry—and it may be contrary to the fact and against his own judgment—the edict of the legislature, the

Court is commanded to take possession by its officers of the place and shut it up; nor is all this destruction of property, by legislative edict, to be made as a forfeiture consequent upon conviction of any offense, but merely because the legislature so commands; and it is done by a *Court of equity* without any previous conviction first had, or any trial known to the law.

"This, certainly, is a formidable arraignment of the legislation of Kansas, and if it were founded upon a just interpretation of her statutes, *the Court would have no difficulty in declaring that they could not be enforced without infringing the constitutional rights of the citizen.*"

So under the oleomargarine butter statute the Court which tries the cause does nothing except one thing—find out if the accused made or sold, or had for sale the oleaginous compound as a substitute for butter. If that is found the penalty follows, even though the Court should be fully satisfied that instead of being in the least injurious to the public it was highly beneficial.

Is this due process of law? A law which hears and passes before it decides? Are these the general principles of law, a due regard for which must be shown when a citizen's liberty is invaded? If so, what occupation may not be prohibited? The farmer who tills the soil; the mechanic who works at the anvil, or in any of the multiplied forms of industrial enterprise; the merchant who engages in trade; the doctor who heals the sick. Indeed, every branch of industry, one after the other or all together may be stopped.

It affords no opportunity for the citizen to show how useful and harmless his avocation is. Without a trial, or any investigation, which goes to the real merits of the question, he is found guilty and punished, and the courts of his State, in answer to his demand for his constitutional rights, reply, we are powerless to review this Act of the legislature.

Without going into details, we repeat that the manufacture and sale of oleomargarine was a peaceful occupation, harmless to none.

Prior to the Act, Powell was in the use and enjoyment of such occupation. He had fitted himself therefore. It was his liberty so to do. The Act of May 21, 1885, prohibited him from engaging in such occupation. It would be difficult to imagine a more thorough deprivation of his calling than is done by this Act. It therefore does deprive Powell of his liberty without due process of law, and *it therefore is in conflict* with the provisions of the 14th amendment to the Federal Constitution.

(VI.) *The Act of May 21st, 1885, is in conflict with the Fourteenth Amendment, because it deprives the Plaintiff in error of his property without due process of law.*

In two respects, indeed four, Powell was deprived of his property.

(I.) He offered to prove (page 6) that the oleomargarine butter sold by him to the prosecuting witness was part of a large and valuable quantity manufactured prior to the 21st of May, 1885, in accordance with the laws of this Commonwealth relative to the manufacture and sale of said article.

(II.) Large investments made in real estate, and suitable buildings and machinery for the manufacture of oleomargarine, which would be rendered practically worthless if he should be prevented from continuing his business.

(III.) Destruction of the business of the purchase and sale of oleomargarine from which he had derived large gains and profits.

(IV.) The State takes from the Plaintiff in Error $100.00 for exercising his legal right in selling oleomargarine butter. This deprives him of this $100.00 without due process of law.

In *Bartmeyer vs. Iowa*, 18 *Wallace* 133, when the prohibition law of Iowa was considered, this Court said:

"But if it were true, and it was fairly presented to us, that the Defendant was the owner of the glass of intoxicating liquor which he sold to Hickey at the time that the State of Iowa first imposed an absolute prohibition on the sale of such liquors, then we concede that two very grave questions would arise, namely: 1. Whether this would be a State law depriving him of his property without due process of law; and secondly, whether if it were so, it would be so far a violation of the Fourteenth Amendment in that regard as would call for Judicial action by this Court."

In the *Beer Co. vs. Massachusetts*, 97 *U. S.* 25, it was again said:

"We do not mean to say that property actually in existence and in which the right of the owner has become vested may be taken for the public good without discompensation."

In the case at *bar* this question is raised. The identical oleomargarine butter sold to the prosecuting witness was part of a quantity made prior to May 21st, 1885, the date of the State Act. It was then lawful to manufacture it.

"The right to manufacture includes the incidental right to "dispose of the liquors manufactured."

Beer Co. vs. Massachusetts, 97 *U. S.* 32.

"The right of property includes the right to sell."

Thurman vs. Elder, 24 *New York* 384, 385.

"The exclusive right of using and transferring property "follows as a natural consequence from the perception and "admission of the right itself."

2 *Kent's Com.* * *page* 320—(13*th Ed.*)

"The power of alienation of property is a *necessary incident* to the right of property."

2 *Kent's Com.* * *page* 327—(13*th Ed.*)

The person who actually manufactured the oleomargarine butter had the right then to sell the article so made, and *this* article, became a legitimate one of commerce, which had upon it the seal and stamp of legality.

If *the* manufacturer had the right to sell, this necessarily implies the right of some one else to buy.

Now the State of Pennsylvania so administered this Act of May 21st, 1885, as to punish the grocer who bought it and who then actually sold it to the prosecuting witness.

It is true that the grocer is not punished because he *bought,* but if he had a right to buy, did not this include a right to sell? And if it was lawful for him to buy, how does it become part of the police power to prohibit him from selling the identical thing he bought? How would such a sale injure public health, good order or morals?

The *property* which Powell had in this oleomargarine was his rights in relation to it, and this included the right to possess, use, enjoy and dispose of it.

Wynehamer vs. People, 13 *New York*, 378, 433.
Storman vs. Elder, 24 *New York*, 384-5.
Eaton vs. B. C. and M. R. R., 51 *N. H.*, 511.
1 *Blackstone Com.* * *page* 8.

If the oleomargarine butter was wholesome, harmless and in no way injured the public, or Powell's neighbors, why should he be deprived of his right to the use and enjoyment and disposal of it?

When the Act of May 21st, 1885, prohibited him from selling it, and punished him because he did so sell, it *deprived* him of an essential element of property, and as we have before seen the mode in which this was done, was *not* due process of law.

This Pennsylvania Act prevents Powell from further using for the purpose of the manufacture and sale of oleomargarine butter the property which he bought and fitted up, and which is practially valuable for those purposes. In so doing it deprived him of one of the most cherished rights of property—the using it for such purposes as are the most remunerative. We admit that the Kansas Prohibition cases substantially rule that such a use may be prohibited if its consequences injuriously affect the public health, peace or morals. But if we have been successful in showing that such use *does not* so injuriously affect the public health, peace, morals, or good order, but on the contrary is beneficial to the public, and especially those of limited means—then such deprivation is unwarranted and is in conflict with the Fourteenth Amendment.

Part of Powell's occupation in life was the manufacture and sale of oleomargarine butter. In this occupationhe had a property. Like the good will of a business, it might be more or less valuable—but it was his property. When he is forbidden to continue this occupation, and its continuance by any one else is also forbidden, is not this property taken from him?

In *Blackstone's Commentaries, Vol.* 1*st, page* 138, he says:

> "The third absolute right inherent in every Englishman "is that of property, which consists in the free use, enjoy- "ment and disposal of all his acquisitions without any con- "trol or diminution save only by the law of the land."

In *Pompelly vs. Green Bay Company,* 13 *Wall.* 166, 167, Mr. Justice Miller said:

> "There may be such serious interruptions to the common and necessary use of property as will be equivalent to a taking within the meaning of the constitution."

In *The People vs. Otis,* 98 *N. Y.* 48, the Court said:

> "Depriving an owner of property, of one of its attributes is depriving him of his property within the constitutional provision."

In *Wynehamer vs. The People*, 13 *N. Y.*, 378, 398, the Court of Appeals said:

> "When a law annihilates the value of property and strips it of its attributes by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation and certainly within the constitutional provision intended expressly to shield personal rights from the exercise of arbitrary powers."

In the matter of the application of *Jacobs*, 98 *N. Y.* 105, that Court again said, where a law had prohibited the making of cigars in tenement houses:

> "It is therefore plain that this law interferes with the profitable use of his property by the owner or lessee of a tenement house who is a cigar maker and trammels him in the application of his industry and the disposal of his liberty and thus in a strict legitimate sense it arbitrarily deprives him of his property and of some portion of his personal liberty. The constitutional guarantee that no person shall be deprived of his property without due process of law may be violated without the physical taking of the property for public or private use."

In *Eaton vs. B. C. & M. R. R.*, 51 *New Hampshire*, 511, the Supreme Court of that State, said:

> "The term 'property,' although in common parlance frequently applied to a tract of land or a chattel in its legal signification 'means only the rights of the owner in relation to it. 'It denotes a right * * * over a determinate thing. Property is the right of any person to possess, use, enjoy and dispose of a thing.' * * * The right of indefinite user (or of using indefinitely) is an essential quality or attribute of absolute property without which absolute property can have no legal existence. Use is the real side of property * * * From the very nature of these rights of user. * * * It is evident that that cannot be

"materially abridged without *ipso facto* taking the owner's "property."

Wood's Railway Law, Section 253.

In another way Powell will be deprived of his property if the judgment of the Court below is affirmed. The State of Pennsylvania takes from him one hundred dollars of his money because he sold oleomargarine butter as a substitute for dairy butter. It is taken from him as a penalty for exercising his constitutional right of liberty. Without repeating the argument heretofore made, it did this *not* by due process of law, but by legislative rescript, and therefore the Act so administered has deprived him of his property without due process of law.

(VII.) *An examination of the cases and authorities bearing on the oleomargarine legislation:*

The Supreme Courts of Missouri and of Pennsylvania have sustained such legislation as constitutional.

State vs. Addington, 77 Missouri, 110.

The Pennsylvania decision followe that of Missouri in leaving the whole matter to the legislature.

The Missouri Court said, page 117:

> "The position of the Defendant in substance is, that if the wholesomeness of the article as one of food, could be established, that thereby the constitutionality of the Act which forbids its sale would be overthrown. This is clearly a *non sequiture.* Such a position, if pushed to its logical conclusion, would utterly overthrow the exercise of the police power by the State; overthrow every law, the wisdom of which would not bear the test of scrutiny. Proceeding on such a theory, a man arrested for killing game at an unlawful season, might appropriately offer to prove that the birds killed were injurious to the public or were destructive to crops."

Exactly how the police power would be overthrown by the judicial department of the government seeing to it that a law called a police law is such *in fact* and does *as a fact* have relation to the public health, morals or peace, and does not, under the guise of the police power, attack and defeat the private rights of personal liberty and property, is not quite plain. Just such supervision this Court since its foundation has exercised over cases arising within its jurisdiction, and it is certainly a new doctrine of these latter days that a legislature is the final judge of questions of fact and of its own powers.

It is also a new doctrine that a man has *property* in the shooting of birds, and to decide a case involving constitutional liberty and the protected right of private property by a faulty and pernicious analogy which the Court draws, surely does not lend weight to the case as an authority.

The decision of the Supreme Court of Pennsylvania and Missouri were not unanimous.

In the Missouri case the Chief Justice dissented, and in the Pennsylvania case Mr. Justice Gordon filed a dissent printed in the record, pages 32, 33, 34.

A unanimous decision of the Court of Appeals of the State of New York held that a statute identical with the Pennsylvania Act was unconstitutional.

People vs. Marx, 99 *New York*, 377. We quote from it as follows:

> "It appears to us quite clear that the object and effect of the enactment under consideration were not to supplement the existing provisions against fraud and deception by means of imitations of dairy butter, but to take a further and bolder step, and by absolutely prohibiting the manufacture or sale of any article which could be used as a substitute for it, however openly and fairly the character of the substitute might be avowed and published, to drive the substituted article from the market, and protect those engaged in the manufacture of

dairy products againat the competition of cheaper substances capable of being applied to the same uses, as articles of food.

"The learned counsel for the respondent frankly meets this view, and claims in his points, as he did orally upon the argument, that even if it were certain that the sole object of the enactment was to protect the dairy industry in this State against the substitution of a cheaper article made from cheaper materials, this would not be beyond the power of the Legislature. This, we think, is the real question presented in the case. Conceding that the only limits upon the legislative power of the State are those imposed by the State Constitution and that of the United States, we are called upon to determine whether, or not, those limits are transgressed by an enactment of this description. These limitations upon legislative power are necessarily very general in their terms, but are at the same time very comprehensive. The Constitution of the State provides (Art. 1, §1) that no member of this State shall be disfranchised, or deprived of any of the rights and privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers. Section 6, of article 1, provides that no person shall be deprived of life, liberty or property, without due process of law, and the Fourteenth Amendment to the Constitution of the United States provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." These constitutional safeguards have been so thoroughly discussed in recent cases that it would be superfluous to do more than to refer to the conclusions which have been reached bearing upon the question now under consideration. Among these no proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit. (*Live Stock Association vs. The Crescent City, etc.*, 1 *Abb.* (*U. S.*)

398; *Slaughter House Cases*, 16 *Wall*, 106; *Corfield vs. Coryell*, 4 *Washington, D. C.* 380; *Matter of Jacobs*, 98, *N. Y.* 98.)

"The term 'liberty,' as protected by the constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creater, subject only to such restraints as are necessary for the common welfare. In the language of Andrews, J., in *Bertholf vs. O'Reilly* (74 *N. Y.* 515), "the right to liberty embraces the right of man 'to exercise his faculties and to follow a lawful avocation for the support of life," and as expressed by Earl, J., in *In re Jacobs*, "one may be deprived of his liberty, and his constitutional right thereto violated, without the actual restraint of his person. Liberty in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation."

"Who will have the temerity to say that these constitutional principles are not violated by an enactment which absolutely prohibits an important branch of industry for the sole reason that it competes with another, and may reduce the price of an article of food for the human race.

"Measures of this kind are dangerous even to their promoters. If the argument of the respondent in support of the absolute power of the legislature to prohibit one branch of industry for the purpose of protecting another with which it competes can be sustained, why could not the oleomargarine manufacturers, should they obtain sufficient power to influence or control the legislative councils, prohibit the manufacture or sale of dairy products? Would arguments then be found wanting to demonstrate the invalidity under the Constitution of such an act? The principle is the same in

both cases. The numbers engaged upon each side of the controversy cannot influence the question here. Equal rights to all are what are intended to be secured by the establishment of constitutional limits to legislative power, and impartial tribunals to enforce them."

The only other case upon the subject is that of *In Re Brosnahan*, 18 *Federal Reporter*, 62.

This was a proceeding by a writ of *habeas corpus* before Justices Miller and McCrary sitting at circuit.

So far as the opinion shows the Court did not pass upon two questions now urged before this Court. They are, (1) That the Pennsylvania Act denies to Powell the equal protection of the laws, and (2) deprives him of his liberty.

The opinion does say that in that case the prisoner was not deprived of his property without due process of law and remanded him to the State Court.

The oleomargarine legislation has caused considerable discussion lately as to its constitutionality and as to the limits of the police power.

Tiedeman, on the Limitations of the Police Power, treats at length of this legislation and holds it unconstitutional.

D. T. WATSON,

Attorney for Plaintiff in Error.

APPENDIX.

AN ACT

For the protection of the public health, and to prevent adulteration of dairy products and fraud in the sale thereof.

SECTION 1. *Be it enacted, &c.*, That no person, firm or corporate body shall manufacture out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk, or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her, or their possession with intent to sell the same as an article of food.

SEC. 2. Every sale of such article or substance, which is prohibited by the first section of this Act made after this Act shall take effect, is hereby declared to be unlawful and void, and no action shall be maintained in any of the Courts in this State to recover upon any contract for the sale of any such article or substance.

SEC. 3. Every person, company, firm or corporate body who shall manufacture, sell or offer or expose for sale or have in his, her or their possession with intent to sell, any substance, the manufacture and sale of which is prohibited by the first section of this Act, shall, for every such offense, forfeit and pay the sum of one hundred dollars, which shall be recoverable with costs by any person suing in the name of the Commonwealth as debts of like amounts are by law recoverable; one-half of which sum, when so recovered shall be paid to the proper county treasurer for the use

of the county in which suit is brought and the other half to the person or persons at whose instance such a suit shall or may be commenced and prosecuted to recovery.

SEC. 4. Every person who violates the provisions of the first section of this Act, shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than one hundred dollars, nor more than three hundred, or by imprisonment in the county jail for not less than ten nor more than thirty days, or both, such fine and imprisonment for the first offense, and imprisonment for one year for every subsequent offense.

SEC. 5. It shall be the duty of constables of the several cities, boroughs, wards and townships of this Commonwealth, to make quarterly reports under oath to the Courts of Quarter Sessions of all violations of any of the provisions of this Act which may come or be brought to their notice, and it shall be the duty of the judges of said Courts to see that said returns are made regularly and faithfully.

SEC. 6. This Act shall take effect on the first day of July, one thousand eight hundred and eighty-five.

SEC. 7. All Acts or parts of Acts inconsistent with the provisions of this Act are hereby repealed.

Approved, the 21st day of May, A. D. 1885.

ROB'T E. PATTISON.

AN ACT

For the protection of dairymen and to prevent deception in sales of butter and cheese.

SECTION 1. *Be it enacted, &c.*, That every person who shall manufacture for sale, or who shall offer or expose for sale, or who shall export to a foreign country, by the tub, firkin, box or package, or any greater quantity, any article or substance in semblance

of butter or cheese, not the legitimate product of the dairy, and not made exclusively of milk or cream, but into which any oil, lard or fat, not produced from milk or cream, enters as a component part, or into which melted butter or any oil thereof has been introduced to take the place of cream, shall distinctly and durably stamp, brand or mark upon the side of every cheese, and also upon the top and side of every such tub, firkin, box or package of such article or substance, the words "oleomargarine butter," or if containing cheese, the words "imitation cheese" only, where it can be plainly seen in Roman letters, which shall be burned in or painted thereon with permanent black paint in a straight line, and shall not be less than one-half inch in length, and if for export shall also invoice the same and clear the same through the custom house as "oleomargarine butter," or if cheese, as "imitation cheese," and in case of retail sales of such articles or substances in parcels, the seller shall, in all cases, sell or offer or expose the same for sale from a tub, firkin, box or package stamped, branded or marked, as herein stated, and shall also deliver therewith to the purchaser, printed label bearing plainly printed words "oleomargarine butter," or if cheese the words "imitation cheese" only, in Roman letters, not less than one-half inch in length, which shall be printed in a straight line, and every sale of such article or substance, or export of the same, by the tub, firkin, box or package, or in any greater quantity; not so stamped, branded or marked, and, if exported, not invoiced and cleared through the custom house as "oleomargarine butter," or if cheese as "imitation cheese," and every sale of such article or substance at retail in parcels that shall not be sold from a tub, firkin, box or package so stamped, branded or marked, or without delivery of a label therewith as above stated, is declared to be unlawful and void and no action upon any contract shall be maintained in any of the Courts of this State to recover upon any contract for the sale of any such article or semblance not so stamped, branded, marked, labeled or sold.

SEC. 2. Every person who shall sell, or offer or expose for sale, or export to a foreign country, or have in his or her possession with intent to sell, by the tub, firkin, box or package,

or in any greater quantity, any of the said article or substance, required by the first section of this Act to be stamped, branded, marked, and if exported, invoiced and cleared through the custom house as "oleomargarine butter" or "imitation cheese" as therein stated, that shall not be so stamped, branded, marked, and if exported, invoiced according to the provisions of this Act, or in case of retail sales in parcels, every person who shall sell, or offer or expose for sale any of said article or substance without selling, offering or exposing for sale the same from a tub, firkin, box or package, stamped, branded or marked as in said first section stated, or without delivery of a label as required by section one of this Act, shall for every such offense, forfeit and pay a fine of one hundred dollars, to be recovered, with costs, in any of the Courts of this State having cognizance thereof in an action to be prosecuted by any district attorney in the name of the Commonwealth, and shall be paid into the county treasury.

SEC. 3. Every person who shall sell or offer or expose for sale or export to a foreign country, or who shall cause or procure to be sold, offered or exposed for sale, by the tub, firkin, box or package, or in any greater quantity, any article or substance required by the first section of this Act to be stamped, branded, marked, and if exported, invoiced and cleared as therein stated, not so stamped, branded, marked, and if exported, invoiced and cleared, or in case of retail sales in parcels, every person who shall sell, or offer or expose for sale, or who shall cause or procure to be sold, offered or exposed for sale, any article or substance required by the first section of this Act to be sold, offered or exposed for such sale from a tub, firkin, box or package stamped, branded or marked, and labeled as therein stated contrary to the provisions of said section, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than fifty dollars nor more than two hundred dollars, or by imprisonment in the county jail for not less than ten nor more than thirty days, or by both such fine and imprisonment for each and every offense.

SEC. 4. All Acts or parts of Acts inconsistent with the provisions of this Act, are hereby repealed.

Approved, the 24th day of May, A. D. 1883.

ROBERT E. PATTISON.

AN ACT

To prevent deception in the sale of butter and cheese.

SECTION 1. *Be it enacted*, &c., That every person who shall manufacture for sale or who shall offer or expose for sale, any article or substance in semblance of butter or cheese, not the legitimate product of the dairy, and not made exclusively of milk or cream, but into which the oil or fat of animals not produced from milk enters as a component part, or into which melted butter or any oil thereof has been introduced to take the place of cream, shall conspicuously and durably stamp, brand or mark upon every tub, firkin, box or package of such article or substance, the word "oleo-margarin," in type or letters not less than one-half inch; and in case of retail trade of such article or substance in parcels, the seller shall in all cases deliver therewith to the purchaser a written or printed label, bearing the plainly written or printed word "oleo-margarin," in type or letters as aforesaid; and every sale of such article or substance not so stamped, branded, marked or labeled, is declared to be unlawful, and no action shall be maintained in any of the Courts of this State to recover upon any contract for the sale of any such article or substance not so stamped, branded, marked or labeled.

SEC. 2. Every person who shall knowingly sell, or offer to sell, or have in his or her possession, with intent to sell, contrary to the provisions of this Act, any of the said articles or substance required by the first section of this Act, to be stamped, marked or labeled, as therein stated, not so stamped, marked, or labeled, or in case of retail sale, without delivery of a label required by section one of this Act, shall for each such offense,

forfeit and pay a fine of one hundred dollars, to be recovered with costs in any of the Courts of this State, having cognizance thereof, in an action to be prosecuted by the district attorney in the name of the people, and the one-half of such recovery shall be paid to the informer and the residue shall be applied to the support of the poor in the county where such recovery is had.

SEC. 3. Every person who shall knowingly sell, or offer, or expose for sale, or who shall cause or procure to be sold, or offered, or exposed for sale, any article or substance required by the first section of this Act to be conspicuously and durably marked, branded, stamped or labeled, not so marked, branded, stamped or labeled, shall be guilty of a misdemeanor, and on trial for such misdemeanor, proof of the sale, or offer, or exposure alleged, shall be presumptive evidence of knowledge of the character of the article so sold or offered, and that the same was not marked, branded, stamped or labeled as required by this Act.

Approved, the 22d day of May, A. D., 1878.

J. F. HARTRANFT.

forfeit and pay a fine of one hundred dollars, to be recovered with costs in any of the Courts of this State, having cognizance thereof, in an action to be prosecuted by the district attorney in the name of the people, and the one-half of such recovery shall be paid to the informer and the residue shall be applied to the support of the poor in the county where such recovery is had.

SEC. 3. Every person who shall knowingly sell, or offer, or expose for sale, or who shall cause or procure to be sold, or offered, or exposed for sale, any article or substance required by the first section of this Act to be conspicuously and durably marked, branded, stamped or labeled, not so marked, branded, stamped or labeled, shall be guilty of a misdemeanor, and on trial for such misdemeanor, proof of the sale, or offer, or exposure alleged, shall be presumptive evidence of knowledge of the character of the article so sold or offered, and that the same was not marked, branded, stamped or labeled as required by this Act.

Approved, the 22d day of May, A. D., 1878.

J. F. HARTRANFT.

127-678

No. 914. October Term, 1887.

IN THE

Supreme Court of the United States.

W. L. Powell,
Plaintiff in Error,

vs.

The Commonwealth of Pennsylvania,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

A. H. WINTERSTEEN,
WAYNE MacVEAGH,
For Defendant in Error

ALLEN, LANE & SCOTT, PRINTERS, PHILADELPHIA.

Supreme Court of the United States.

W. L. Powell

vs.

The Commonwealth of Pennsylvania.

October Term, 1887.

No. 914.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The General Assembly of the State of Pennsylvania passed an act entitled "An act for the protection of the public health, and to prevent adulteration of dairy products and fraud in the sale thereof," which was approved May 21st, 1885, and took effect July 1st of that year.

The first section of the act is as follows:—

SECTION 1. Be it enacted, &c., that no person, firm or corporate body shall manufacture out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk, or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk, or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her or their possession with intent to sell, the same as an article of food.

Under this act the plaintiff in error was indicted at the August sessions of the Court of Quarter Sessions of the Peace

for the county of Dauphin, for violating the act on the 10th of July previous, by selling oleomargarine or imitation butter. He was duly convicted by a jury.

Before entering judgment the court heard argument upon a motion for a new trial and in arrest of judgment, and after full deliberation, discharged the motion and sentenced the defendant to pay a small fine.

The case was carried to the Supreme Court of the State on the ground that the act under which he was convicted was unconstitutional. That tribunal affirmed the decision of the court below, declaring the constitutionality of the act.

Thereupon Powell took out a writ of error from this court.

ARGUMENT.

The careful and elaborate examinations of the law governing this case made by the Court of Quarter Sessions and the Supreme Court of Pennsylvania (see Opinions, Record, pages 8 and 28), render it almost needless for us to discuss anew the principles upon which its proper decision would appear to rest. But simple questions of constitutional law are so easily confused and made intricate by speculative minds, that courts are always indulgent of even unnecessary attempts to restate them with a view to clearness of apprehension.

For the proper apprehension of such questions as the present it is important that certain fundamental principles as to the relation of National to State authority, and of judicial to legislative functions under our system of government, be kept in mind.

The States as such have absolute and unlimited power except as they are specifically restrained by the Federal Constitution. The proposition is as old as the Constitution itself, that while the Federal Government is one of limited powers, the States are governments of general powers. They are sovereignties. They may do all that belongs to sovereignty, except where they have definitely relinquished a portion of it by grants to the Federal authority. They may determine and control the acts and occu-

pations of their citizens, and declare what shall and what shall not be property capable of possession and entitled to protection, and it is not possible to gainsay this right upon any grounds short of showing a definite relinquishment thereof. When, therefore, the validity of any proceeding of a State is in question, it is to be tested by no written grant of enumerated powers, but by a consideration of the attributes of sovereignty as it is enjoyed by the State organized with general powers of government. The fundamental maxim of our system is that the people rule, that is to say, the many, as distinguished from the few or the one, determine what shall be the laws for their own guidance. By the people of course is meant the majority of the people whose voice is uttered in popular elections. Upon the organization of the State and National systems the people could have directed their own absolute powers to be exercised, and could have divided and distributed them, in any way they chose. They chose to separate them into three distinct divisions. They constituted a legislative, an executive and a judicial department of government, whose respective functions are familiarly stated to be, to make the laws, to execute the laws, and to construe the laws. They sought to separate, and they succeeded in separating, these functions by broad lines by the very practical method of constituting different bodies to exercise them. To the legislature they delegated their own absolute power of making laws, which should be rules of command or of prohibition according as the end sought might be positive or negative. To the executive they delegated their power of carrying out or executing the will of the law-making body. To the judiciary they assigned the duty of interpreting the will of that body, and in so far, and only in so far, as it assumed powers not legislative in their character, of controlling that will by declaring that any particular exercise of it was not a law.

Obviously this division of powers was intended to be complete, exhausting the prerogatives of government. Each department was made supreme. The legislature was made the supreme legislature. The executive was made the supreme executive. The judiciary was made the supreme judiciary. They were made absolute departments as such. And that they might

be absolute they were made independent of one another. Not that they were absolute in the sense of being able permanently to perpetuate wrong to the people who created them, for in the very act of creation the people preserved final control to themselves by establishing the system of frequent popular elections, whereat abuses could be corrected by the selection of proper men to correct them. The departments *were* made absolute in the sense that so far as concerned control, direction or correction of any particular exercise of a function of one department, there was no contemplated possibility of interference by another.

It is commonly said that it was intended that the department of the judiciary should be a check upon the other departments, the executive and the legislative. This is true only in the sense that the judiciary was authorized by its declarations to prevent encroachments by one department upon the province of the others. Thus it was given to the judiciary to say that the executive department could not as such perform a legislative act, and that the legislature could not assume executive functions or perform a judicial act. It was not intended to authorize the judiciary to enter the executive or legislative departments, or, what would be practically the same thing, to sit in judgment upon any act of either of those departments which belonged within their respective provinces. For the judiciary to do this would be a plain usurpation by it of *extra* judicial functions, and the harmony of the system would at once be destroyed.

The courts are, therefore, powerless to consider the merits of acts of the legislature which are plainly legislative in their character, and they are thus powerless, because the very system of which the courts themselves are a part, makes the legislature as supreme in its department as the judiciary is in its own. These considerations apply equally whether the judicial tribunal to whom they are addressed belongs to the Federal or to a State system. The limitations of judicial functions respecting legislative acts are of the same character under every organized American government.

The act of the Legislature of Pennsylvania in question is directed against an article, the manufacture and sale of which the

legislature found to be detrimental to the health and morals of the community. This substance was known as artificial or imitation butter, and was made from animal fats and colored with a coloring matter to make it resemble butter. The legislature had previously endeavored to prevent imposition on the public by the enactment of stringent laws regulating sales of the article. Finding those ineffective, in order to properly protect the public whose interests it was bound to guard with care, the present law was passed.

The only possible question relating to this law which upon the above principles it is possible for courts to consider, is this: Is the act fairly and properly a legislative act? If so, there can be no basis for judicial inquiry into it. It needs but a glance at the act to discover that so far as its scope and intendment are concerned it is purely legislative. It is a general law applicable to all persons within the Commonwealth. It is wholly without arbitrary features. It affects all citizens alike. It is a public enactment concerning public interests. It does not attempt to take from one individual what is his own and give it to another, nor is it judicial in its nature in declaring any particular persons or class of persons subject to its restrictions and liable to its penalties. Beyond examining the act to see that it is in truth such an act, judicial inquiry under our system may not go.

It is, of course, not possible for the legislature to be directed criticised or overruled by the judiciary as to its *subjects* of legislation. These are to be determined according to its own discretion. The last act of the kind before this court for examination, the prohibition liquor law of Kansas, concerned articles of drink. The present relates to an article used for food. There is in reason no bar or restraint against legislative action on the one subject or the other, so long as the lines which separate legislative from judicial functions are recognized. And the present act, as we have seen, fully recognizes these lines and keeps within them.

With the force of these conclusions directly against him, the plaintiff in error, in the preceding stages of this legislation, has sought aid from the Federal and State Constitutions, which he has vainly endeavored to array against the legislation in question.

From the nature of the present forum the scope of the argument he has relied on as based upon these Constitutions becomes very limited. The only question which remains at all open is whether the Pennsylvania oleomargarine act of 1885, whose provisions he has so industriously assailed, is in conflict with any portion of the Constitution of the United States. All considerations of the relation of the act to inhibitions of the Constitution of the State of Pennsylvania or to abstract standards of justice must be considered as already out of the case.

"It is hardly necessary to say," said this court, in Missouri Pacific Railway Co. *vs.* Humes, 115 U. S., 520, "that the hardship, impolicy or injustice of State laws is not necessarily an objection to their constitutional validity; and that the remedy for evils of that character is to be sought from State legislatures. Our jurisdiction cannot be invoked, unless some right claimed under the Constitution, laws, or treaties of the United States is invaded. This court is not a harbor where refuge can be found from every act of ill-advised and oppressive State legislation."

It will be worth while, therefore, for us to examine the argument as it seeks to array the Constitution of the United States against the oleomargarine act of Pennsylvania now under review.

The Fourteenth Amendment, it is charged, is violated by the act of the General Assembly of Pennsylvania in question. The provision relied upon is the familiar injunction: Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. There is alleged to be: 1. *A deprivation of liberty without due process of law.* 2. *A deprivation of property without due process of law.* 3. *A denial to the plaintiff in error of the equal protection of the laws.*

These allegations may be considered in their order. The first two of them, it will be observed, stand, in a sense, apart from the third. The inhibition against a deprivation of liberty or property extends only to the demand that it shall not be done *without due process of law.* On the other hand, the denial of the equal protection of the law is absolutely enjoined.

Answers to the questions raised by the above allegations in the assignments of error are therefore to be found in the consideration of two preliminary questions:—

1. What is meant by "due process of law"?
2. What is meant by "equal protection of the laws"?

1. WHAT IS MEANT BY "DUE PROCESS OF LAW"?

"There is abundant evidence," said Mr. Justice Miller in Davidson *vs.* New Orleans, 96 U. S., 104, and Mr. Justice Field in Missouri Pacific Railway Co. *vs.* Humes, 115 U. S., 519, speaking of the clause from which the above words are taken, "that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. It would seem * * * that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court, of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded."

In accordance with this view, this court, although declining to commit itself to any particular definition of "due process of law," preferring to ascertain the intent and application of the phrase "by the gradual process of judicial inclusion and exclusion," has uniformly recognized and insisted upon its definite limitations and scope, by attention to which, the application or want of application of the clause in which it is found to any particular case or class of cases, may readily be seen.

"Due process of law" generally implies and includes *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceeding."

Murray's Lessee *vs.* Hoboken Land and Improvement Company, 18 How., 272, 280.

"This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. Due process of law is process due according to the law of the land."

Walker *vs.* Sauvinet, 92 U. S., 90, 93.

"The better and larger definition of *due process of law* is that it means law in its regular course of administration through courts of justice."

2 Kent's Commentaries, 13;

Hurtado *vs.* California, 110 U. S., 527.

"It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice according to the mode of proceedin in such a case."

Davidson *vs.* New Orleans, 96 U. S., 105;

Ex parte Wall, 107 U. S., 265, 289.

"In the Fourteenth Amendment, due process of law refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all civil and political institutions, *and the greatest security for which resides in the right of the people to make their own laws and alter them at their pleasure.*" The fundamental principles referred to, within which the States' power must be exercised, exclude arbitrary or despotic legislation, acts of local or special application and enforceable without judicial process. "It (the legislative act) must be not a special rule for a particular process or a particular case, but in the language of Mr. Webster in his familiar definition, '*the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,*' so '*that every citizen shall hold his life, his liberty, property and immunities under the protection of the general rules which govern society,*' *and thus excluding as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial and arbitrary execution of powers under the forms of legislation.*"

Hurtado *vs.* California, 110 U. S., 516, 535.

Missouri Pacific Railway Co. *vs.* Humes.

"By 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be

affected. *It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the pvotection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought.* The clause in question means, therefore, that there can be no proceeding against life, liberty or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for security of private rights."

Hagar *vs.* Reclamation District, 111 U. S., 701, 708;
Missouri Pacific Railway Co. *vs.* Humes.

These recent expositions by this court of the phrase "due process of law" accord with that given by the State courts.

"The terms 'law of the land' (or due process of law) are now, in their most usual acceptation, regarded as general public laws, binding upon all the members of the community, under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals."

James *vs.* Reynolds, 2 Tex., 251.

"The words, 'the law of the land,' have the same origin, and are to the same effect as 'due process of law' in the Bill of Rights in the Constitution of the United States, and it means judgment of law in its regular course of administration through courts of justice."

Fetter *vs.* Wilt, 46 Pa. St., 457.

Chief Justice Gibson, in Norman *vs.* Heist, 5 W. & S., 173, defined the phrase "judgment of his peers or the law of the land" as a pre-existent rule of conduct declarative of a penalty for a prohibited act, not an *ex post facto* rescript or decree made for the occasion.

See Craig *vs.* Kline, 65 Pa. St., 413;
Byers *vs.* Commonwealth, 42 Pa. St., 89;
Vanzant *vs.* Waddell, 2 Yerg., 260.

It is obvious that, however indefinite from one aspect the meaning of the phrase "due process of law" may be, it means something else than "natural justice," "natural right," the

"principles of republican government," or "the spirit of the Constitution," and this has been repeatedly so decided.

Metropolitan Board of Excise *vs.* Barree, 34 N. Y., 657;
Bertholf *vs.* O'Reilly, 74 *Id.*, 509;
Fisher *vs.* McGirr, 1 Gray, 1;
State *vs.* Almond, 2 Houst. (Del.), 612;
Fry *vs.* State, 63 Ind., 552;
Winch *vs.* Tobin, 107 Ill., 212;
People *vs.* Gallagher, 4 Mich., 244;
Court of St. Louis County *vs.* Griswold, 58 Mo., 175;
State *vs.* Mugler, 29 Kans., 252, affirmed by this court Dec. 5, 1887.

As early as 1798, a learned justice of this court, Mr. Justice Iredell, recognized the distinction, which has been insisted on by the court ever since. He said (Calder *vs.* Bull, 3 Dall., 399): "If the legislature of the Union, or the legislature of any member of the Union, shall pass a law within the general scope of their constitutional power, the court cannot pronounce it to be void merely because it is in their judgment contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and the purest men have differed on the subject; and all that the court could properly say in such an event would be that the legislature, possessed of an equal right of opinion, had passed an act which in the opinion of the judges was inconsistent with the abstract principles of natural justice."

If, therefore, a legislative enactment is a general law applicable to all persons and all classes, if it is adapted to the end to be attained, if it gives to any particular person affected by it opportunity to be heard judicially respecting his amenability to its terms, and, if with all these, the forms of legislative and judicial procedure are followed respecting it, reason and authority agree that it is an enactment made by "due process of law."

2. WHAT IS MEANT BY "EQUAL PROTECTION OF THE LAWS"?

By this is meant that all persons, or classes of persons, similarly situated are entitled to the same protection under the law.

In Missouri Pacific Railway Co. *vs.* Humes (*supra*), the railroad company, on the ground of inequality of protection, objected to a State statute which required, under heavy penalties, every railroad corporation in the State to erect and maintain fences along its tracks. The court answered as follows: "The statute makes no discrimination against any railroad company in its requirements. Each company is subject to the same liability and from each the same security, by the erection of fences, gates and cattle-guards, is exacted, where its road passes through, along, or adjoining enclosed or cultivated fields or unenclosed lands. *There is no invasion of the rule of equality where all companies are subjected to the same duties and liabilities under similar circumstances.*"

In Barbier *vs.* Connolly, 117 U. S., 27, and Soon Hing *vs.* Crowley, *Id.*, 703, two statutes which forbade the exercise of the business of laundrying during certain hours of the night were assailed as unconstitutional, as denying the equal protection of the laws. It was objected that there was an unjust discrimination in favor of other businesses not subject to the regulation. Said the court (page 708): "There is no force in the objection that an unwarrantable discrimination is made against persons engaged in the laundry business, because persons in other kinds of business are not required to cease from their labors during the same hours at night. * * * The specific regulations for one kind of business which may be necessary for the protection of the public can never be a just ground of complaint, because like restrictions are not imposed upon other business of a different kind.

"*The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions.* It is only then that the discrimination can be said to impair the equal right which all can claim in the enforcement of the laws."

Having seen the authoritative meaning of the phrases, "due process of law," and "equal protection of the laws," the statute before the court may now be examined and the objections to it specifically considered.

The act, according to its title, had three objects: to protect the public health, to prevent adulteration of food products, and to prevent fraud upon the public in the sale of the latter. It sought to effect its object by forbidding the manufacture of substitutes for butter out of any oleaginous substance but certain well-recognized articles for making butter, namely, unadulterated milk and cream; by forbidding the manufacture of imitation or adulterated butter or cheese, and by forbidding the selling, offering for sale or having for sale the same as an article of food.

I. *This act did not deprive the plaintiff in error of his liberty without due process of law.*

The word "liberty," as used in the Federal and State Constitutions, is not to be understood as synonymous with the natural right of the individual as in a state of nature to dispose of his person and pursue his own happiness unrestrained by law.

Liberty is the creature of law, essentially different from that authorized licentiousness that trespasses on right.

Webster's Works, II., 393.

"Civil liberty, the great end of all human society and government, is that state in which each individual has the power to pursue his own happiness, according to his own views of his interest and the dictates of his conscience, unrestrained, except by equal, just and impartial laws. *Laws are, therefore, the just and necessary limits of natural liberty.*"

1 Sharswood's Blackstone, page 127, note 8.

Legal and political literature is full of recognitions of the doctrine of governmental restraint of the individual, and of the defeasibility by legislative enactment of the individual's natural rights.

It is a matter of every-day observation that the State, by operation of its laws, takes the lives of its citizens, deprives them of their liberty, directs the disposition and use of their property and curtails their pursuit of happiness. The natural right of the individual in a state of barbarism to do as he pleases, he has willingly modified by his obligation in a state of society to conform to its law. The murderer is hanged or imprisoned, the

delinquent or disobedient are fined, and the careless are restrained from following the bent of their own desires, through considerations of the public welfare. The individual may do, not what he pleases, but what it is lawful for him to do. To ascertain what is unlawful the roll of constitutional legislative enactments is to be consulted and their prohibitions respected. What is a constitutional enactment is determined only by reading each act by the side of the definite restraints on legislation found in the Constitution, and applying the tests of constitutionality which the adjudicated cases have laid down.

Much is made in argument of the alleged absolute right of choice of occupation. It is said to be one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit not injurious to the community as he may see fit. Conceding the truth of this as an abstract proposition, the question remains to be answered, *what is a lawful industrial pursuit not injurious to the community,* within the purview of the proposition? A *lawful* occupation is certainly not one which the legislature, in the exercise of the State's sovereign power, declares shall be *unlawful.*

Who is to declare as between the legislature and the judiciary, what is a pursuit *injurious or not injurious* to the community? Unless, in the particular instance where the claim is asserted, all our instincts and experiences agree that the declaration on its face is false, it is for the legislature so to declare. For there is nothing in our system of government, Federal or State, that makes the judiciary competent to judge of the *truth of a fact asserted by the legislature,* unless the particular statement of fact is contrary to all human experience. The people of the State are sovereign as concerns their own internal affairs, and the legislative voice is the people's voice by representation.

The Parliament of England possesses almost absolute power. Its power and jurisdiction, as was said by Sir Edward Coke, is so transcendent and absolute that it cannot be confined, either for persons or causes, within any bounds.

4 Inst. 36. 1 Blackst. Com., 160.

"This being the highest and greatest court, over which none other can have jurisdiction in the kingdom, if by any means a

misgovernment should fall upon it the subjects of this kingdom are left without all manner of remedy."

Sir Matthew Hale, quoted by Blackstone, 1 Com., 160.

And the American legislatures possess the absolute legislative powers of the British Parliament, without possessing its executive and judicial functions.

Cooley's Constitutional Limitations, 86–92.

"The governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions."

Chief Justice Waite in Munn *vs.* Illinois, 94 U. S., 113, 124.

"It has never been questioned," said Chief Justice Redfield, of Vermont, "that the American legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written constitutions."

Thorpe *vs.* Rut. & Burl. R. R. Co., 27 Vt., 140.

"In the different States the legislature certainly has the right, as a general rule, to do all that seems necessary for the common welfare and is not specifically prohibited."

Lieber's Civil Liberty and Self-Government, page 161.

Cooley, in his "Constitutional Limitations," page 87, says: "In creating a legislative department and conferring upon it the legislative power the people must be understood to have conferred the full and complete power as it rests in and may be exercised by the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose, and to the limitations which are contained in the Constitution of the United States. The legislative department is not made a special agency for the exercise of specifically defined legislative powers, but is intrusted with the general authority to make laws at discretion." See also Sharpless *vs.* Mayor, 21 Pa. St., 147.

Said Mr. Webster:—

"All that is necessary here is that the will of the people should be ascertained by some rule of proceeding prescribed by previous law. But when ascertained, that will is as sovereign

as the will of a despotic prince or the Czar of Muscovy, or the Emperor of Austria himself, though not quite so easily made known."

Webster's Works, VI., 227.

In this view what becomes of the plaintiff in error's liberty of choice of occupation? It becomes reduced to a right to choose such occupations as the State in its sovereign power may not have declared to be unlawful. The right of a State to declare that certain occupations are unlawful because inimical to the public welfare would seem scarcely to be a subject for debate.

"It is the undoubted and reserved power of every State here as a political body to decide * * * who shall compose its population, who become its residents, who its citizens, who enjoy the privileges of its laws and be entitled to their protection and favor, *and what kind of property and business it will tolerate and protect.*"

Mr. Justice Woodbury in License Cases, 5 How., 629.

If the State is sovereign in any just sense, it would seem to follow that it may do this even without giving a reason for its action. The legislature, as the exponent of the people's will, will be presumed to have a reason for their action in its public utility. But it is not for the court to inquire into the nature of this public utility. In the States' prohibition of the exercise of employments, it will always happen that the liberty of individuals to pursue callings of their own selection is interfered with. But that is no serious objection to the exercise of the legislature's power of prohibition, because, if it exists, it must exist with all its incidents and inconveniences to particular persons.

It is notorious that it is not lawful for every person to practice medicine or law, or engage in certain other businesses, because the legislature has prescribed certain conditions which must first be fulfilled. It could not be held that a legislative act was unconstitutional, even if it increased the restrictions on the exercise of certain employments until it practically prevented their exercise by the community, for the reason that the legislature has not been denied the power to enact such a law. It may be conceded that a law arbitrarily made, affecting vested rights of property or privilege, would be open to constitutional objections.

But not so a law expressive of legislative sovereignty to the utmost, which applies to *future conditions and acquisitions.* "There are high authorities for saying there is in every government somewhere an absolute and despotic power."

Braddee *vs.* Brownfield, 2 W. & S., 285.

"The legislature may enjoin, permit, forbid, and prevent; they may declare new crimes; they may command what is right, and prohibit what is wrong."

Calder *vs.* Bull, 3 Dall., 388.

A wrong is as much a wrong, if in the class of *mala prohibita*, as if it were a *malum in se.*

The only practical restraint upon the deprivation of the citizen's liberty by the State that need be considered, therefore, is the injunction that it shall not be done *without due process of law.* We have seen what is due process of law. It will hardly be questioned that the act under consideration is a general law, applicable to all persons in the Commonwealth, that it was passed regularly and in due form by the legislature, and that the plaintiff in error was convicted under its provisions, after a fair trial in a court of justice. The only possible open questions are, therefore, whether the end sought to be attained by it is legitimate, and whether it is adapted to that end. The end sought, as gathered from the title of the act, is to protect the public health, to prevent the adulteration of a food product, and to prevent fraud. And the purpose of a law is presumed to be what the legislature declares it to be. The court cannot impute to the legislature any other but public motives for their acts.

Sunbury & Erie R. R. Co. *vs.* Cooper, 33 Pa. St., 278;

People *vs.* Draper, 15 N. Y., 545;

Cooley's Constitutional Limitations, star page 187.

"The rule is general, with reference to the enactments of all legislative bodies, that the court cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferrible from their operation, considered with reference to the condition of the country and existing legislation."

Soon Hing *vs.* Crowley, 113 U. S., 710;

License Cases, 5 Howard, 583.

Surely an end, such as that disclosed by the title of the act, is not only legitimate, but to secure it is a part of the very primary functions of the State.

The condition of existing legislation on the subject at the time of the passage of the act, taken in connection with the sales of the article legislated against, shows the genuine need for the act, and permits the presumption of the honest motives of the legislature in passing it. Previous acts had been passed, and were in force at the time, regulating the sale of oleomargarine, but it was notorious that the legislation in force was ineffective to prevent the fraud on the public, caused by selling the article for what it was not, to say nothing of the injury to health from the unwilling consumption of the product by deceived buyers, and the adulteration of genuine butter.

See act of May 22d, 1878, Laws of Penna. page 87;
Act of June 10th, 1881, Laws of Penna. page 116;
Act of May 24th, 1883, Laws of Penna. page 43.

If it is for the judiciary further to inquire into the purpose of the act in question, it may be said that the fact that oleomargarine, in the judicial knowledge, as well as in the legislature's information, *can without detection be made from impure animal fats*, which must be unhealthy, is conclusive as to the possibility of the product being unhealthy, and vindicates as a health law the act prohibiting it.

The circumstances that in the judicial knowledge, as well as in the information of the legislature, dairy butter can be and is sometimes actually mixed with the imitation article in the process of manufacture, would seem to show that the legislative assumption of adulteration of dairy products in the manufacture could, by possibility at least, be well founded.

The fact that oleomargarine is or can be readily sold for what it is not, dairy butter, and that its very appearance and flavor were given to it to perfect the resemblance thereto, stamps it as a convenient instrument of fraud, and warrants the legislative effort to suppress it.

There was no evidence before the courts of Pennsylvania that there was anything else than a public purpose to be served in the passage of the act.

It need not be stated that if the purpose or end sought by the act was legitimate the method selected was adapted to the end. The argument of the plaintiff in error concedes that the act was only too well adapted to the end sought; namely, the total suppression of the manufacture and sale of oleomargarine. Under this head, the question resolves itself down, therefore, to the proposition whether a State legislature, when it discovers that a proposed new manufacture which is not necessary to the people, is actually harmful in many ways, can suppress it by appropriate legislation. To this it would seem there can be but one answer so long as it remains the law of this court, that each State is entitled to say for itself, *what kind of business it will tolerate and protect in its midst.*

II. *The act did not deprive the plaintiff in error of his property without due process of law.*

We are fortunate upon this point in having a number of expressions of opinion from this and other courts, as to what is and what is not a deprivation of property without due process of law. Said the court of last resort of Illinois in its opinion in Munn *vs.* People, 69 Ill., 80 (affirmed by this court in Munn *vs.* Illinois, 94 U. S., 113): "*No one is deprived of his property within the meaning of the constitutional inhibition, so long as he retains its title and possession.*

No prohibitory law is passed affecting commercial or manufacturing interests without incidentally impairing the value of property. But this incidental injury is not a taking in the sense of the Constitution. If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed by any incidental inconvenience which individuals or corporations may suffer.

Beer Co. *vs.* Massachusetts, 97 U. S., 25–32.

The reduction in value of buildings, machinery, and other appliances adapted for the manufacture of an inhibited article, consequent upon the passage of the prohibitory act, is therefore

not a taking of them, so long as the title remains in the owner and there is any value in it left to him. *Id.*

Weil *vs.* Calhoun, 25 Fed. Rep., 865, 872;

Bartemeyer *vs.* Iowa, 18 Wall., 129.

The incidental impairment in value of property consequent upon the enactment of a valid public law is unfortunate, but, as was observed by a learned judge, it is one of the risks that every man takes in entering a business or making an investment, and he cannot complain.

The recent "milk" cases illustrate the extent to which property may be deprived of value by the State without infringing the constitutional inhibitions.

In State *vs.* Smyth, 14 R. I., 100, it was decided that a law establishing an arbitrary standard of purity for milk, below which it could not be sold, was not unconstitutional. It was objected that if the natural milk of cows happened to be very thin and below the standard, the deprivation of the sale of such milk was an unjust discrimination against the owner and a deprivation of property without due process. It was answered, however, that the sale of naturally thin milk as good commercial milk was as much a fraud as if it were actually watered, and there was no deprivation of property in taking from the owner of a cow giving very thin milk the right of sale of the milk, since, as intimated by the court, the cow had still some value as an "irrigator" if not as a milk producer. See also Commonwealth *vs.* Evans, 132 Miss., 11; State *vs.* Newton, 45 N. J. L., 469; People *vs.* Cipperly, 101 N. Y., 634; reversing the Supreme Court of New York in 44 N. Y. S. C., 319.

But it is solemnly argued by the plaintiff in error that there was a deprivation of his property without due process, because the specific oleomargarine, for the unlawful sale of which he was indicted, was manufactured, as he offered to prove, before the act was passed. It was not claimed that the oleomargarine was manufactured or owned by the defendant before that time. But protection was asked for him under Bartemeyer *vs.* Iowa and Beer Co. *vs.* Massachusetts, merely because the specific thing was in existence then. This argument, it is submitted, has not even the merit of being specious. The utterances of the justices

in those cases were to the effect that vested rights of property in existence before the passage of a prohibitory act were entitled to protection *in the hands of the party in whom they were then vested*, but not in the hands of a purchaser after the law was passed. This is clear from the language of Mr. Justice Bradley in Bartemeyer *vs.* Iowa, 18 Wall., 136.

"This was a prosecution for selling intoxicating liquor in Iowa, contrary to a law of that State which prohibits the sale of such liquor. The defendant pleaded that he was the lawful owner of the liquor in Iowa, and a citizen of the United States prior to the day on which the law was passed. * * * Judgment was given against the defendant on his plea. The truth is, that the law in question was originally passed in 1851, and was incorporated into the revision of 1860, in the chapter referred to in the plea. Whether the plea meant to assert that the defendant owned the liquor prior to the passage of the original law, or only prior to its re-enactment in the revision, is doubtful, and, being doubtful, it must be interpreted most strongly against the pleader. *It amounts, therefore, only to an allegation that the defendant became owner of the liquor at a time when it was unlawful to sell it in Iowa. The law, therefore, was not in this case an invasion of property existing at the date of its passage, and the question of depriving a person of property without due process of law does not arise.*"

See also *In re* Brosnahan, 18 Fed. Rep., 62, 67.

The contention that there was a deprivation of property without due process because prior investments in buildings and machinery adapted for the manufacture of oleomargarine were made less valuable by the act, must be conceded to be without force since the decision by this court of the Kansas liquor cases, Mugler *vs.* State of Kansas, and State of Kansas *vs.* Ziebold, December 5th last. It was there directly ruled that a State prohibition law which in effect reduced the value of buildings and other property invested in the manufacture of intoxicating liquor nine-tenths, but left the title in the defendants, did not deprive the owners of their property in the sense of the constitutional inhibition. If a statute is not inimical to the constitution on other grounds, it cannot be successfully assailed because it incidentally impairs prior investments.

III. *The act did not deprive the plaintiff in error of the equa protection of the laws.*

Every person in Pennsylvania was by the act prohibited from manufacturing, selling or having in his possession with intent to sell, the substance as an article of food. There is here then absolute equality of right (or rather of disability), and under the definitions of "equal protection," given above, there is no violation of the constitutional provision. But it is said that the law was designed to protect the business of the butter-maker by striking down that of the oleomargarine-maker. Conceding for the present, for argument's sake only, this to have been the case, which is not correct, there could be no violation of the above provision, so long as all oleomargarine manufacturers fare alike. There is no discrimination against persons under the same conditions. If the State has power to say, as it certainly has, what businesses or industries it will tolerate and protect and what businesses or industries it will prohibit, who shall gainsay any particular exercise of that power? The argument is practically that of the railroad company in Missouri Pacific Railroad Company *vs.* Humes, and of the laundryman in Hurtado *vs.* California, *supra*, and needs only the answer there given by the court to the then plaintiffs in error.

There is no analogy between this case and that of Yick Wo *vs.* Hopkins, 118 U. S., 356, by which it is claimed to be ruled There a municipal ordinance to regulate the carrying on of public laundries within the limits of the municipality was held to deny the equal protection of the laws, because it conferred upon the municipal authorities arbitrary power, at their own will, and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places, and without regard to the competency of the persons applying or the propriety of the place selected for the carrying on of the business. The effect of the ordinance was that laundrymen of a certain race were driven out of their business by the prejudices of the authorities who were vested with the power to grant or withhold consent, while all others were protected in the same business.

Here the case is very different. There is no arbitrary discretion lodged anywhere. All persons alike, as in Hurtado *vs.*

California, and Soon Hing *vs.* Crowley, are subject to the prohibition.

But it is not the fact, conceded for argument's sake above, that the *object* of this law was to build up one industry at the expense of another. When it is said in the act that no person shall make, except from milk or cream, any article designed to take the place of butter produced from milk or cream, it is meant to prohibit oleomargarine, not only when it comes in competition with butter, but to prohibit altogether. The phrase "any article designed to take the place of butter" is merely descriptive of the article legislated against. This is shown from the fact that there is no use for oleomargarine and kindred artificial products, other than as substitutes for butter. A phrase stating all the uses to which a substance can be put is as truly indicatory as that of the name by which it may be generally known. And when it is considered that there were or might have been several artificial products of the kind in existence at the time of the passage of the act, and that there was no name common to them all, the absolute necessity appears of describing them by a phrase which characterized their uses.

It may very well be that the effect of the act was to give *incidental* protection to one industry by the prohibition of another. But this is not denying the equal protection of the laws. In the Slaughter House Cases, 16 Wall., it will be recollected that the incidental protection or monopoly granted by the act then under consideration to one company *in the same business*—that of slaughtering—*with those adversely affected by it*, was not a successful argument against the constitutionality of the act. It follows *a fortiori* from this that the incidental advantage given by this act to dairymen, *persons in a different business from those engaged in making oleomargarine*—for the plaintiff in error concedes that they are different industries—cannot affect its constitutionality.

IV. *The act is to be sustained as a valid exercise of the police power of the State.*

The phrase "police power" has perhaps both a narrow and a broad signification.

The narrower view confines it to laws concerning the public health, public morals, public comfort, or public safety.

Thorpe *vs.* Rutland & Burlington R. R., 27 Vt., 140;
Commonwealth *vs.* Alger, 7 Cush., 85.

The broader view makes it synonymous with the State's sovereign power, or power to make laws at discretion, subject only to the definite constitutional restraints. The latter is the definition of the power given by this court, and the one, therefore, by which we may be guided.

City of New York *vs.* Miln, 11 Pet., 102;
License Cases, 5 How., 504;
Munn *vs.* Illinois, 94 U. S., 125.

"What are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions * * * the power to govern men and things within the limits of its dominion."

Chief Justice Taney in 5 How., p. 583;
Chief Justice Waite in 94 U. S., p. 125.

"A State has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. By virtue of this it is not only the right, but the bounden and solemn duty of a State, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare by any and every act of legislation which it may deem to be conducive to these ends, where the power over the particular subject or the manner of its exercise is not surrendered or restrained, in the manner just stated. All those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*, are not thus surrendered or restrained; and, consequently, in relation to these the authority of a State is complete, unqualified and exclusive. * * *

"If we were to attempt it, we should say that every law came within this description which concerned the welfare of the whole people of a State, or any individual within it; whether it related to their rights or their duties; whether it respected them as men,

or as citizens of the State; whether in their public or private relations; whether it related to the rights of persons or of property, of the whole people of a State or of any individual within it; and whose operation was within the territorial limits of the State, and upon the persons and things within its jurisdiction."

Mr. Justice Barbour in City of N. Y. *vs.* Miln, 11 Pet., 139.

With this view of the police or sovereign power of the State, it is obviously unnecessary to inquire into the nature or object of any particular act of State authority, excepting in so far as it may be desirable to do so to apply to it the constitutional restraints.

It is the duty of the legislature to make laws for the good of the people. But whether a particular law is for the good of the people, it is not for the courts to decide in passing upon the constitutionality of the law.

"The legislature is to make laws for the public good, and not for the benefit of individuals. It has control of the public moneys and should provide for disbursing them only for public purposes. Taxes should be levied for those purposes which properly constitute a public burden, *but what is for the public good, and what are public purposes, and what does properly constitute a public burden, are questions which the legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion which cannot be controlled by the courts, except perhaps when its action is clearly evasive and where under pretense of a lawful authority it has assumed to exercise one that is unlawful.*"

Constitutional Limitations, star page 129.

"Every power vested in government is in its nature sovereign, and includes by force of the term a right to employ all the means requisite and fairly applicable to the attainment of the ends of such power, and which are not precluded by restrictions and exceptions specified in the Constitution or not immoral, or not contrary to the essential ends of political society."

Hamilton's Works, IV., 105, Cabinet Papers.

The discussion, therefore, might well be rested here, without

further inquiry into the nature of the law. It happens, however, that there are so many laws and ordinances in force in this country whose constitutionality has been declared or conceded, which are analogous in character to the present law, that a reference to a few of them may be useful by way of illustration, in connection with those referred to in the opinions of the courts whose judgments are now under review.

In the State of Pennsylvania alone, the following laws are conceded or have been declared to be valid "police" laws:—

An act forbidding the sale or keeping for sale of unwholesome provisions, drugs, &c. Purd. Dig., 10th ed., Crimes, section 99.

An act forbidding the sale of poisonous drugs without label. Purd. Dig., Crimes, section 100.

An act forbidding the importation of convicts. Purd. Dig., Crimes, section 106.

An act forbidding the attendance of female servants in theatres or concert saloons. Purd. Dig., Crimes, section 112.

An act requiring the sale of shell fish only in certain months, and in a certain manner. Purd. Dig., Crimes, section 115.

An act prohibiting cashiers of banks from engaging in any other profession or occupation. Purd. Dig., Crimes, section 93.

An act requiring that bread shall be sold only by weight. Purd. Dig., 10th ed., page 175.

An act declaring that butter and lard for exportation shall be subject to inspection, and put up in a certain way. Purd. Dig., page 188.

An act forbidding the use of injurious and impure materials in the manufacture of liquors. Act 2d June, 1881, P. L., 43.

An act forbidding the sale of deadly weapons and explosives to minors. Act 10th June, 1881, P. L., 111. The statute prohibiting the performance of worldly business on Sunday.

Specht *vs.* Commonwealth, 8 Pa. St., 312;

Waldo *vs.* Commonwealth, 9 W. N. C., 200.

Health and quarantine laws.

Board of Health *vs.* Lloyd, 1 Phila., 20.

The law prohibiting the erection of wooden buildings in cities.

Respublica *vs.* Duquet, 2 Yeates, 493.

The law authorizing the summary conviction of professional thieves.

Byers *vs.* Commonwealth, 42 Pa. St., 89.

The law forbidding the carrying of concealed deadly weapons.

Wright *vs.* Commonwealth, 77 Pa. St., 470.

The law regulating the sale of liquors.

Commonwealth *vs.* Schoenhutt, 3 Phila., 20.

The law forbidding the sale of railroad tickets except by the authorized agents of railroad companies.

Commonwealth *vs.* Wilson, 9 W. N. C., 291.

All the other States have similar laws.

In Arkansas it is made an offense to sell any pistol except certain kinds, as the "navy" pistol, thus "protecting," as the plaintiff in error would put it, the manufacturer of the navy pistol.

Dabbs *vs.* State, 39 Ark., 353.

Dangerous machinery may be regulated, and the owners required to put guards around it.

Mayor *vs.* Williams, 15 N. Y., 502.

The keeping of dogs may be discouraged by inflicting a penalty on their owners for keeping them.

Mitchell *vs.* Williams, 27 Ind., 62;

State *vs.* Cornell, *Id.*, 120.

License fees may be imposed to prevent people from carrying on business deemed by the legislature injurious to the health, safety, or welfare of society.

Tenney *vs.* Lenz, 15 Wis., 566;

Carter *vs.* Dow, *Id.*, 298.

The assertion has been made that the State's power over the liberty and property of its citizens is limited to the *regulation* of property, and does not extend to the *prohibition* of possession and sale. This view is untenable.

Rigid prohibitory liquor laws have been held constitutional, or recognized as such, in Maine, Vermont, Massachusetts, Connecticut, Delaware, Michigan, Illinois, Iowa, and Kansas, and by this court.

Cooley Const. Limitations, page 582, notes 1 & 2:

Mugler *vs.* State, 123 U. S.;

State *vs.* Ziebold, decided Dec. 5, 1887.

There are but two cases in which constitutional objections to prohibitory liquor laws have been upheld. These are—

Beebe *vs.* State, 6 Ind., 501, and Wynehamer *vs.* People, 13 N. Y., 378.

"Against the doctrine of these two cases," said Judge Thompson in State *vs.* Addington, 12 Mo. Appeals, 223, "stands arrayed the opinion of every other State in the Union, so far as we know, where the question has been passed upon, and also that of the Supreme Court of the United States."

This court has time and again declared that the absolute prohibition of the manufacture and sale of intoxicating drinks is not contravened by anything in the Constitution of the United States.

Mugler *vs.* State, 123 U. S.;
Foster *vs.* Kansas, 112 U. S., 201;
Beer Company *vs.* Massachusetts, *supra;*
Bartemeyer *vs.* Iowa, *supra.*

The Supreme Court of Pennsylvania in its opinion found a strong analogy to the present act in the laws prohibiting the sale of pure milk and pure water mixed. To the cases declaring these acts constitutional, may be added those above referred to, making it penal to sell the natural milk of the cow, not artificially watered, if it happened to be below a certain arbitrary standard.

The courts of Missouri, previous to the decision of the Supreme Court of Pennsylvania, came to the conclusion subsequently reached by that court. Whereas the Court of Appeals of New York, in People *vs.* Marx, 99 N. Y., 377, decided that a law such as the present was unconstitutional.

Until the decision of the case by the Court of Appeals of New York no case, it is believed, ever decided that a law prohibiting the manufacture and sale of an article intended for human food was unconstitutional.

The discussion of the law, in the opinion of the court in the New York case, is very unsatisfactory.

The proposition on which the judges united to place their decision was the well-settled one, that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such *lawful* industrial pursuit, *not injurious to the community*,

as he may see fit; for which they cited the following cases: Live Stock Assn. *vs.* The Crescent City, &c., 1 Abb. U. S. R., 398; Corfield *vs.* Coryell, 4 Wash. C. C. R., 380; and Matter of Jacobs, 98 N. Y., 98. From this well-established doctrine they proceeded with scarcely a show of reasoning, to the conclusion that the oleomargarine law under consideration was unconstitutional. Before reaching their conclusion, it would seem to have been proper for them, as above observed, to inquire *what is a lawful industrial pursuit not injurious to the community*, within the purview of their proposition.

This was not done by them, unless their passing an opinion on the New York law as one intended to foster a monopoly in certain manufacturers of dairy products, is to be supposed to constitute such inquiry.

We have seen that a lawful occupation is one which the State, in the exercise of its police or sovereign power, has not declared to be unlawful.

The extent of this police power, then, and not the uninterpreted general proposition, stated by the court as to right of occupation, was the pertinent inquiry before them. This inquiry was eluded.

It is significant that no authorities were cited by the New York Court of Appeals to justify the conclusion reached. Of the four cases cited in the opinion by way of authority for the general principles announced, one was practically reversed by a contrary decision on the same facts in the Supreme Court of the United States (Live Stock Assn. *vs.* The Crescent City, &c.), 1 Abb. U. S. R., 398, decision *contra* in the Slaughter-house Cases, 16 Wallace, 36; two decided in favor of a very liberal interpretation of the State's exercise of its police power (Corfield *vs.* Coryell, 4 Wash. C. C. R., 380; Bertholf *vs.* O'Reilly, 74 N. Y., 509); and the remaining one declared unconstitutional a legislative enactment wholly different in its facts and ruled by a different principle from that then before the court. The Circuit Court of the United States, in the district of Louisiana, decided in Live Stock Assn. *vs.* The Crescent City, &c., *supra*, that an act of the Legislature of Louisiana, which, *inter alia*, granted to a certain slaughter-house company exclusive privileges in the keeping of

slaughter-houses in a certain section of Louisiana, and which required all butchers to have their butchering done on the grounds of the company, was unconstitutional as creating a monopoly, and as forbidding the individual from exercising a lawful business. But this court, taking a different view, held that the grant of special privileges was merely a police regulation for the sake of the health of the people, and the restrictions on individual labor consequent upon the act, were at best incidental and wholly within the power of the legislature.

The case of Corfield *vs.* Coryell decided that a law of New Jersey, under which the vessel of a certain citizen of another State was confiscated for engaging in fishing within the territorial limits out of season, was constitutional, as being within the police power of the State.

The case of Bertholf *vs.* O'Reilly held that a law of New York, which rendered the owner of a building liable for damages resulting from the sale of liquor on the premises was within the police power of the State legislature, and not unconstitutional for its incidental restraint upon the lawful use of real property by the owner.

The case entitled Matter of Jacobs was the familiar one known as the Tenement House Cigar Case. There the New York Court of Appeals held a legislative act unconstitutional because it was a tyrannical restraint on individual rights. The act made it a criminal offense to manufacture cigars in the upper rooms of tenement houses where more than three families lived. A feature of the law was that, although the manufacture of cigars generally was legal, and although the manufacture of cigars in houses with three families was declared to be legal, yet if, through no fault or by no arrangement of the previous tenants, a fourth family moved in, the future business of the tenants was illegal and to continue it was a crime. Of course such a law, which on its face contained contradictory provisions as to the legality and illegality of the same character of act, was insupportable. Had the law provided that the manufacture of cigars out of certain substances of known repulsiveness to the people, wherever and whenever and by whomsoever undertaken, should be unlawful, it would have been sufficiently analogous to the

facts of the oleomargarine case to be of use in its decision. But, with the principles of the law as heretofore considered, its authority must have directed a decision contrary to that given.

The decision in People *vs.* Marx, without sufficient reason, as we have seen, to stand by itself, is wholly without a basis of support in analogous authority.

Much more satisfactory, and better reasoned, are the opinions of the courts of Missouri and Pennsylvania, affirming the constitutionality of the oleomargarine laws of those States. They rest upon the impregnable position that it is the right and the duty of the State to protect the public from fraud, and *the provision dealer from temptation to commit fraud.* There is no law more clearly of a police nature than this, supposing the word to be given its narrowest meaning. It inculcates public morality by forbidding the deceiver from acquiring the means of deception, *none of which means of deception are necessary to society.*

But as the only question before this court is the narrow one whether or not the law under consideration contravenes any provision of the Constitution of the United States, it is needless to discuss the merits of State decisions.

A recent exposition of the Fourteenth Amendment by Mr. Justice Field in Barbier *vs.* Connolly, 113 U. S., 31, is a conclusive answer to the claim of the protection of the Constitution of the United States from such legislation as the present. The Justice says :—

The Fourteenth Amendment, in declaring that no State "shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights: that all persons should be equally entitled to pursue their happiness, and acquire and enjoy property; that they should have like

access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that, in the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. *But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity.* * * * Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, th general good; though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

It may be observed that even if it were the fact (which it is not) that the sole object of the Pennsylvania oleomargarine law of 1885 was to protect and develop the dairy industry of Pennsylvania, the law would be valid as a police measure, under the above exposition by the court. If it is proper for the State *to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity,* surely it is for the State to say what industries need to be encouraged so as to add to its wealth and prosperity, and, if the dairy industry is one of these, it is for the legislature to pass appropriate laws. But,

these considerations need not be pressed, as we are not permitted to suppose that the object of the act was anything else than its title would indicate, namely: "For the protection of the public health, and to prevent adulteration of dairy products, and fraud in the sale thereof."

The above principles declared by this court may be found restated in various forms in the opinions of all the justices of the Federal courts throughout the land. In no recent utterance are they more tersely stated than in the words of Judge Speer, of the Southern District of Georgia: "*When the political power of the State, for the safety of its people, takes the responsibility of saying that certain occupations are hurtful and will not be permitted in its boundaries, unless that declaration is so unreasonable as to be outside the domain of law, it is a purely political responsibility, and there is an end of the matter.*"

In re Hoover, 30 Fed. Rep., 51, 55.

It may be added that the exact point now before this court for decision has already been decided in accordance with the present contention, by Mr. Justice Miller of this court, sitting as Circuit Justice in the Circuit Court for the Western District of Missouri. The case arose upon a writ of *habeas corpus* and after a conviction followed by fine and imprisonment under the Missouri law, which made it illegal to manufacture or sell oleomargarine. All the arguments raised by the plaintiff in error here were raised by the counsel for the prisoner there, and answered fully by the court.

Said the Justice: "We are next to inquire whether the statute deprives the owner of this product of his property, within the meaning of the clause of the Fourteenth Amendment, which says: 'Nor shall any State deprive any person of life, liberty or property without due process of law.' The statute does not, in direct terms, authorize the seizure or taking of any property, not even that whose manufacture is forbidden. The party is not, in fact, deprived of this property by the statute or by any proceeding which it authorizes. The personal punishment, by fine and imprisonment, which the statute imposes, must be inflicted according to the law of Missouri, which allows a trial by jury, with all the other forms which from time immemorial have been

held to be due process of law. The moneyed fine, then, and the liberty of which the party may be deprived, are undoubtedly imposed by due process of law."

In re Brosnahan Jr., 18 Fed. Rep., 62, 66, 67.

Upon the reasoning of this and similar cases cited, and upon the authority of the rulings of this court above referred to, rests the strength of the present case. It has been shown that there is here no taking of liberty or property without due process of law, nor a denial of the equal protection of the laws, as those phrases have been authoritatively defined; that no power exists in this court to inquire further into the nature or wisdom of the act than is necessary to intelligently test it by the constitutional restrictions; but that, even permitting such further inquiry to be made, ample vindication of the act is to be found in its legislative character, as recognized by the analogies of similar enactments, and of its presumed public purpose which has not been disproven. There is therefore, it is conceived, no room for doubt as to the constitutionality of the law. If, however, there is such a doubt, the doubt must be resolved in favor of the defendant in error. "Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is a doubt the expressed will of the legislature should be sustained."

Sinking Fund Cases, 99 U. S., 718;
Munn *vs.* Illinois, 94 U. S., 113, 123.

It is submitted, therefore, that the judgment should be affirmed.

A. H. WINTERSTEEN,
WAYNE MacVEAGH,
For Defendant in Error.

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APR 23 1887
JAMES H. McKENNEY
CLERK

In the Supreme Court of the United States,

OCTOBER TERM, 1886.

No. 1359.

W. L. POWELL, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.
DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR *sur* MOTION TO DISMISS OR AFFIRM.

WEISS & GILBERT,
D. T. WATSON,
For Plaintiff in Error.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1886.

No. 1359.

WILLIAM L. POWELL,
Plaintiff in Error,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

STATEMENT OF FACTS.

On September 5, 1885, an indictment was found containing two counts, in the Court of Quarter Sessions of Dauphin County, Pennsylvania, against William L. Powell, and this indictment will be found on page four of the Record.

It accused him in words as follows: "Did unlawfully sell as an article of food, two cases containing five (5) pounds each of an article designated to take the place of butter produced from pure unadulterated milk, or cream from milk, the said article so sold as aforesaid being an

article manufactured out of certain oleaginous substances and compounds of the same other than that produced from unadulterated milk or cream from milk, and said article so sold as aforesaid being an imitation butter, contrary to the form of the Act of the General Assembly, &c." The second count was: "Did unlawfully have in his possession with intent to sell the same as an article of food, a quantity, viz.: one hundred pounds of imitation butter designed to take the place of butter produced from pure unadulterated milk, or cream from the same, manufactured out of certain oleaginous substances or compounds of the same other than that produced from milk or cream from the same, contrary to the form of the Act of the General Assembly, &c."

The defendant pleaded not guilty. On September 11, 1885, a jury was sworn and the case made out by the Commonwealth was as follows (see Record, pages 4, 5):

> "It is agreed for the purposes of this trial that the "defendant sold to the prosecuting witness in the "City of Harrisburg, July 10, 1885, as an article of "food two original packages, *pro ut*, the said "packages here produced in Court, containing an "article manufactured out of oleaginous substances "and compounds other than that produced from un-"adulterated milk or cream from the same, and de-"signed to take the place of butter produced from "pure unadulterated milk, or cream; that said "packages were sold and bought as butterine and not "as butter produced from pure unadultered milk or "cream from the same.
>
> "It is further agreed that the said defendant had in "in his possession with intent to sell the same as an "article of food one hundred pounds of said article.
>
> "It is further agreed that the packages so sold to "the prosecutor and now produced in court contain "twenty-three pounds each, and that each package "was then and is now marked with the words 'Oleo-"margarine Butter' upon the lid and side of the "package in a straight line in Roman letters half an "inch long."

This was all. There was no attempt to prove that this was "imitation butter." On the contrary, it was *not* sold as butter, but as *butterine*.

The Commonwealth then rested. The defendant having called a witness on the stand offered to prove as follows (Record, pp. 5, 6):

> "The defendant proposes to prove by Prof. Hugo "Blanck that he saw the articles sold to the prosecut- "ing witness manufactured; that it was made from "pure animal fats; that the process of manufacture "was clean and wholesome; that the article contains "the same elements as dairy butter; that the only dif- "ference between them is that the manufactured arti- "cle contains a smaller proportion of the fatty sub- "stance known as butterine; that this butterine "exists in dairy butter in the proportion of from three "to seven per cent., and in the manufactured article "in a smaller proportion, and was increased in the "manufactured article by the introduction of milk "and cream; that this having been done the article "contains all the elements of butter produced from "pure, unadulterated milk or cream from the same, "except that the percentage of butterine is slightly "smaller; that the only effect of butterine is to give "flavor to the butter, and has nothing to do with its "wholesomeness; that the oleaginous substances in "the manufactured article are substantially identical "with those produced from milk or cream; that the "article sold by the defendant to the prosecuting wit- "ness was a wholesome and nutritious article of food, "and in all respects as wholesome and healthful as "butter produced from pure, unadulterated milk, or "cream from the same."
>
> "The District Attorney: We object to the offer as "totally immaterial and irrelevant to the issue now "being tried. The defendant is indicted for the sale, "as an article of food, of a certain substance prohib- "ited by the Legislature from being sold as such, and "the Commonwealth has proved by his own admis-

" sion, that he did sell as an article of food that pro-
" hibited article. We therefore say that any offer of
" testimony to show how that prohibited article was
" manufactured; to show what ingredients enter into
" the composition; to show that it is in the opinion of
" the alleged expert witness now on the stand whole-
" some as an article of food is immaterial and irrele-
" vant to the issue. The Legislature sitting to deter-
" mine what is necessary for the protection of the
" public health has prohibited the sale of this article
" as an article of food, and the Commonwealth has
" shown as I have already stated by the defendant's
" own admission that he did sell the prohibited article
" as an article of food.

" Mr. Gordon: The defendant further offers to prove
" that he is engaged in the grocery and provision
" business in the City of Harrisburg, and that the
" article sold by him was a part of a large and valua-
" ble quantity manufactured prior to the 21st of May,
" 1885, in accordance with the laws of this Common-
" wealth relative to the manufacture and sale of said
" article and so sold by him; and that for the manu-
" facture of said article large investments were made
" in the purchase of suitable real estate, the erection
" of proper buildings, and the purchase of the neces-
" sary machinery and ingredients; that in his traffic
" in the said article the defendant made large profits,
" and that if the said defendant should be prevented
" from trafficking in said articles the value of his prop-
" erty engaged therein would be entirely lost, and he
" would be deprived of the means of a livelihood.

" The Court: Please state the purpose of both
" offers.

" Mr. Gordon: The purpose of this offer is to prove
" that the article sold is not an adulteration of dairy
" product, but a new invention; that it is wholesome
" and nutritious as an article of food and not injuri-
" ous to the public health, and that its manufacture
" and sale are in conformity with the general acts of
" Assembly of May 22, 1878, and May 24, 1883.

"The Court: What legal conclusions do you intend
"to draw?

"Mr. Gilbert: We will simply add to the first offer
"'for the purpose of showing that this act was uncon-
"'stutional.'

"Mr. Gordon: The purpose of the first offer is to
"show that the Act of Assembly under which the
"defendant is indicted is unconstitutional and void
"and not a lawful exercise of police power. To the
"second offer we add that the act is void because it
"deprives the defendant of the lawful use of his
"property, liberty and faculties, and destroys his
"property without making compensation.

"The District Attorney: We object to the second
"offer on the same grounds as to the first--that it is
"immaterial and irrelevant to the issue now being
"tried.

"The Court sustains the objections to the offers
"in each case, and the evidence is excluded *pro*
"*forma*.

"Exception noted for the defendant in each in-
"stance."

This testimony being rejected and bills sealed for the defendant, the Court charged the jury (page 7 of the Record) as follows:

"Gentlemen of the Jury: As this record now stands the commissien of the offense charged in the indictment is admitted, and it is therefore your duty to render a verdict of guilty."

The jury found the defendant guilty, whereupon the defendant moved for a new trial and in arrest of judgment (see pages 7 and 8).

On December 5, 1885, the Court overruled the motion for a new trial and in arrest of judgment, and on the 29th of January, 1886, sentenced the defendant to pay a fine of one hundred dollars and the costs of prosecution. From this judgment a writ of error was taken to the Supreme Court of the State, a special *Allocatur* being allowed March 16, 1886 (see page 21 of the Record).

On January 3, 1887, the Supreme Court affirmed the judgment.

From the judgment so affirmed a writ of error was allowed from this Court.

The State of Pennsylvania in 1878 (see Appendix) passed an act compelling the stamping of "Oleomargarine," and in 1883 passed another act (see Appendix) providing for further stamping each package "Oleomargarine Butter."

The article sold by the plaintiff in error was stamped as these acts required.

Assignments of Error.

(1st.) The Act of the General Assembly of the State of Pennsylvania approved May 21, 1885, entitled An Act "For the protection of the public health, and to prevent adulteration of dairy products and fraud in the sale thereof," on which the indictment was found and the defendant was sentenced in the Courts of Pennsylvania, is unconstitutional and void, because it is in conflict with the provision of the 14th Amendment of the Federal Constitution in the following respects:

(2d.) Because it deprives the plaintiff of his liberty without due process of law.

(3d.) Because it deprives the plaintiff of his property without due process of law.

(4th.) Because it denies to the plaintiff the equal protection of the laws of Pennsylvania.

(5th.) The Supreme Court of Pennsylvania erred in holding that the said Act of Assembly was not in conflict with the Federal Constitution in any respect, but on the contrary should have held that the same was in conflict with the 14th Amendment of the Federal Constitution, and that therefore it was unconstitutional and void, and that the judgment pronounced in the Quarter Sessions of Dauphin County against the plaintiff in error was illegal and void.

(6th.) The Court erred in rejecting the offer of evidence made by the plaintiff in error and defendant below, which offer and ruling thereon is as follows:

"The defendant proposes to prove by Professor "Hugo Blanck, that he saw the article sold to the "prosecuting witness manufactured; that it was made "from pure animal fats; that the process of manu- "facture was clean and wholesome; that the article "contains the same elements as dairy butter; that the "only difference between them is that the manu- "factured article contains a smaller proportion of the "fatty substance known as butterine; that this but- "terine exists in diary butter in the proportion of "from three to seven per cent. and in the manu- "factured article in a smaller proportion, and was in- "creased in the manufactured article by the introduc- "tion of milk and cream; that this having been done, "the article contains all the elements of butter pro- "duced from pure, unadulterated milk or cream from "the same, except that the percentage of butterine is "slightly smaller; that the only effect of butterine is "to give flavor to the butter, and has nothing to do "with its wholesomeness; that the oleaginous sub- "stances in the manufactured article are substantially "identical with those produced from milk or cream; "that the article sold by the defendant to the prosecu- "ting witness was a wholesome and nutritious article "of food, and in all respects as wholesome and health- "ful as butter produced from pure, unadulterated milk, "or cream from the same.

"The District Attorney: We object to the offer as "totally immaterial and irrelevant to the issue now "being tried. The defendant is indicted for the sale "as an article of food of a certain substance prohibited "by the Legislature from being sold as such, and the "Commonwealth has proved by his own admission "that he did sell as an article of food that prohibited "article. We therefore say that any offer of testi- "mony to show how that prohibited article was "manufactured; to show what ingredients enter into

" the composition; to show that it is, in the opinion of " the alleged expert witness now on the stand, whole- " some as an article of food, is immaterial and irrele- " vant to the issue. The Legislature sitting to deter- " mine what is necessary for the protection of the " public health has prohibited the sale of this article " as an article of food, and the Commonwealth has " shown, as I have already stated by the defendant's " own admission, that he did sell the prohibited article " as an article of food.

" Exception noted."

(7th) The Court erred in rejecting the following offer of evidence:

" The defendant further offers to prove that he is " engaged in the grocery and provision business, in " the City of Harrisburg, and that the article sold by " him was a part of a large and valuable quantity " manufactured prior to the 21st day of May, 1885, in " accordance with the laws of this Commonwealth " relative to the manufacture and sale of said article, " and so sold by him; and that for the manufacture " of said article large investments were made in the " purchase of suitable real estate, the erection of " proper buildings, and the purchase of the necessary " machinery and ingredients; that in his traffic in the " said article the defendant made large profits, and " that if the said defendant should be prevented from " trafficking in said article the value of his property " engaged therein would be entirely lost, and he would " be deprived of the means of livelihood.

" The Court: Please state the purpose of both " offers.

" Mr. Gordon: The purpose of this offer is to prove " that the article sold is not an adulteration of dairy " product, but a new invention; that it is wholesome " and nutritious as an article of food and not injurious " to the public health, and that its manufacture and " sale are in conformity with the general acts of " Assembly of May 22, 1878, and May 24, 1883.

"The Court: What legal conclusion do you intend "to draw?

"Mr. Gilbert: We will simply add to the first offer "'for the purpose of showing that this act is uncon- "stitutional.'"

"Mr. Gordon: The purpose of the first offer is to "show that the act of Assembly under which the de- "fendant is indicted is unconstitutional and void, and "not a lawful exercise of police power. To the second "offer we add that the act is void because it deprives "the defendant of the lawful use of his property, "liberty and faculties, and destroys his property with- "out making compensation.

"The District Attorney: We object to the second "offer on the same grounds as the first, that it is im- "material and irrelevant to the issue now being "tried.

"The Court sustains the objections to the offers in "each case, and the evidence is excluded *pro forma*.

"Exception noted for the defendant in each in- "stance."

POINTS OF LAW.

The defendant in error does not pretend that the plaintiff in error did not rely upon the Federal Constitution as a defense in the Court below, and if he had his error would have been apparent upon an inspection of the record (pages 27–).

Nor is it seriously contended that federal questions do not arise upon the record; but the argument is, that the judgment should be affirmed because such federal questions as do arise have been here repeatedly, and have repeatedly been decided in the same way.

Without much elaboration we believe we can show that new, grave and most serious questions do arise in this case as to whether the Act of May 21, 1885, is not in conflict with the *Federal Constitution.*

That act says:

"That no person, firm, or corporate body *shall manufacture out of any oleaginous substance or any compound of the same*, other than that produced from unadulterated milk or of cream from the same, *any article* DESIGNED TO TAKE THE PLACE OF BUTTER OR CHEESE PRODUCED FROM PURE, UNADULTERATED MILK, OR CREAM FROM THE SAME, or of any imitation or adulterated butter or cheese, *nor shall sell or offer for sale, or have in his, her or their possession with intent to sell, the same as an article of food.*"

It will be particularly noticed that this is not an act to prohibit the manufacture or sale of such an article *because* in and of itself it is injurious to the public health, but it prohibits its manufacture and sale *when and only when* it is "*designed to take the place of butter or cheese produced from pure, unadulterated milk or cream from the same.*"

It perhaps does prohibit the manufacture or sale "*of any imitation or adulterated butter or cheese,*" but how far this provision may be constitutional is unimportant, because it is not pretended that the proof in this case on the part of the Commonwealth showed that the plaintiff in error had violated this provision. The proof was (Record, pages 4 and 5) merely that the defendant sold two packages of an "article manufactured out of oleaginous substances and compounds other than that produced from unadulterated milk or cream from the same, and designed to take the place of butter produced from pure, unadulterated milk or cream; *that said packages were sold and bought as butterine and not as butter produced from pure, unadulterated milk or cream from the same.*"

The same record shows the packages were plainly stamped "Oleomargarine Butter" as required by the Act of 1883, a copy of which is printed in the appendix.

The case is thus clear of any fraud or deception, or any adulteration of any kind of an article of food. It was the sale and purchase of oleomargarine, and the seller and buyer knew exactly what was sold and bought.

There was no evidence in any shape or of any kind in the Court below to show that oleomargarine or butterine is injurious to health or morals, or in any way contravenes or effects the peace, health, quiet or morals of the community.

On the contrary, we offered to show (Record, pages 5 and 6) exactly how it was made, and "that the article sold by the defendant to the prosecuting witness was a *wholesome and nutritious article of food, and in all respects as wholesome and healthful as butter produced from pure, unadulterated milk or cream from the same.*"

This case, we repeat, is free from all entangling alliance with fraud, deceit or adulterated products for food.

It does not fall within the police power of the State, which, as difficult as it is to exactly define, does concern such trades, occupations, callings and nuisances as contravene the peace, safety, comfort, good order or morals of the community. It is a limitation upon the liberty and the property of the citizen just when such liberty or property is so used or held as to violate the duty of every one to so use his own as not to injure his neighbor.

The power is one essentially of regulation. For example: One of the powers of the citizen, as we have seen, is personal liberty, which involves the doing of what one may desire. But this right is equally reserved to all of the citizens of Pennsylvania. Now it is not only possible, but experience had demonstrated that this liberty in its fullest extent could not be exercised by every one without, in some way, abridging the equal liberty of other citizens, and, therefore, it is consistent with his liberty that laws should be passed restricting this personal liberty, so that one man may not so use his own as to injure another. Thus J. S., having a contagious disease, may insist upon his liberty to go upon the streets of a great city; but here this necessarily conflicts with the rights of all other citizens to travel unmolested the highways of their country, and therefore the State may, by law, prevent J. S. from so doing.

This power is called the Police Power; and while definitions of it are numerous, they are by no means precise, and it has been said, "from its very nature," it is incapa-

ble of exact definition. Perhaps the best definition of it, so far as this case is concerned, is that of Chancellor Kent, 2 *Commentaries*, 340:

"Unwholesome trades, slaughter houses, operations offensive to the senses, the deposit of powder, * * * the burial of the dead, may all be interdicted by law in the midst of dense masses of population on the general and rational principle *that every person ought so to use his property as not to injure his neighbors.*"

It extends to the protection of the lives, limbs, health and property of the citizens, and persons and property, and all are properly subjected to restraints to secure the general comfort and welfare of the State.

Slaughter House Cases, 16 *Wallace*, 62.
Cooley's Con. Limitations, 715 (*574).

But as this power springs from and is based upon the enforcement of the maxim, *Sic utere tuo ut alienum non laedas* (*Cooley's Con. Lim.*, page *574), and has for its object the preservation of the public health and morals, the legislation which is supported under the guise of the police power *must, as a fact,* be calculated to effect the end to be accomplished—*i. e.*, protect the public health or morals. It must, in its essence, be legislation *about* the public health or morals. An Act of Assembly to give A's property to B could not be legalized by calling it "An Act to protect the public health," nor would an act to arbitrarily and without reason deprive A B of the right to have his own house be made constitutional by calling it "An Act to protect the public morals."

To so hold is to wholly submit the liberty and property of every citizen and person to the arbitrary control of the legislative majority, and notwithstanding this was forcibly said and the doctrine that there was no judicial limit to the police power, but that it was legislative only, was denied by the Supreme Court of Pennsylvania in Craig *vs.* Kline, 65 Pennsylvania Stat., 413, yet in the case *at bar* this wholesome rule was wholly disregarded.

It is one thing to admit that there is the power in the Legislature to pass laws protecting the public health and morals, but it is quite anothor thing to say that the Legis-

lature must itself determine what laws *do* involve the public health and morals and have their decision final.

Mr. Justice Field, in the Slaughter House cases, 16 *Wallace*, 87, said :

" * * Under the pretense of prescribing a police regulation the State cannot be permitted to encroach upon any of the just rights of the citizen which the Constitution intended to secure against abridgement."

In the same cases, page 114, Bradley, *J.*, said :

" The right of a State to regulate the conduct of its citizens is undoubtedly a very broad and extensive one, and not to be lightly restricted. But there are certain fundamental rights which this right of regulation cannot infringe. It may prescribe the manner of their exercise, but it cannot subvert the rights themselves."

The Supreme Court of Illinois, in the Town of Lake View *vs.* Rose Hill Co., 70 *Illinois*, 191, said :

" As a general proposition, it may be stated, it is in the province of the law-making power to determine whether the exigencies exist calling into exercise this (police) power. What are the subjects of its exercise is clearly a judicial question."

In Munn *vs.* Illinois, 94 *U. S.*, 145, Justices Strong and Field said :

" The power of the State over the property of the citizen under the constitutional guaranty is well defined. * * * * * The doctrine that each one must so use his own so as not to injure his neighbor—*sic utere tuo ut alienum non laedas*—is the rule by which every member of society must possess and enjoy his property. * * Except in cases where property may be destroyed to arrest a conflagration or the ravages of pestilence, or be taken under the pressure of an immediate and overwhelming necessity to prevent a public calamity, the power of the State over the property of the citizen does not extend beyond such limits. * *

"Whatever affects the peace, good order, morals and health of the community comes within its scope; and every one must use and enjoy his property subject to the restrictions which such legislation imposes. *What is termed the police power of the State, which, from the language often used respecting it, one would suppose to be an undefined and irresponsible element in government, can only interfere with the conduct of individuals in their intercourse with each other, and in the use of their property, so far as may be required to secure these objects.*"

To the same effect—

People *vs.* Marx, 99 N. Y., 377.

Tenement House Cigar Case, 98 New York, 98.

With great respect we submit that it is misleading and improper to attempt to rule this case on any supposed analogy to the liquor laws or laws prohibiting the manufacture or sale of adulterated articles of food, such as watered milk. These cases are distinct and easily distinguished. In the laws regulating the sale of liquor or prohibiting it, all the past and all the present bear witness to the accepted and clearly demonstrated fact that the sale of liquor does effect the public health and morals and the safety and good order of society.

The License Cases, 5 Howard, 504–631.

In the laws regulating and prohibiting the sale of adulterated articles of food, all admit the public health and the comfort of society are concerned.

These fall properly within the police power.

All the cases cited by the Supreme Court in its opinion can readily be brought under, and they do fall within, the police power, as hereinbefore defined; but heretofore not one single case of any kind ever actually prohibited the sale of an article which was not injurious to health or morals or convenience of society, and then did it, as adding insult to injury, *solely*, as the act on its face shows, to benefit a rival industry.

But here is a case where no one pretends that the sale of pure oleomargarine or butterine can in any shape, man-

ner or form effect the public health, morals, or the peace or good order or comfort of society.

We are not speaking of its adulteration, or deceit or fraud, but of the sale, such as was made in this case, of the pure and genuine article.

This being so, it is urged that in this case there do arise these federal questions:

I.—That this Act of May 21, 1885, in so far as it prohibits the manufacture and sale of oleomargarine when, *and only when*, it comes in competition with butter made from milk or cream, is the protection of one industry—that of making butter from milk or cream—by striking down and prohibiting an equally lawful industry—that of making oleomargarine from the fat of the cow—and that therefore it is in conflict with the XIV. Amendment to the Federal Constitution; *because* it amounts to a practical denial by the State of Pennsylvania of that equal protection of the laws which that amendment guarantees to every person.

It will be noticed that this proposition does not conflict with the decision of this Court in the Slaughter House cases, 16 Wallace, 36, because there the case was held to be an exercise of the police power, but it rather falls within and is governed by the opinion of this Court in

Yick Wo *vs.* Hopkins, 118 U. S., 356.

There a municipal ordinance, which as administered, denied to Yick Wo an equal right with others under proper restrictions to carry on the laundry business was held to conflict with the Federal Constitution.

In the case at bar the plaintiff in error is denied by this act the equal protection of the law in carrying on a wholesome, harmless and legitimate trade, and he is utterly prohibited from doing it because, and only because, the product—oleomargarine—is intended to be sold in the market in competition with butter made from milk or cream.

It is equally as wholesome. The trade of one is equally as harmless as the other.

Has not the State of Pennyslvania denied to the plaintiff in error the equal protection of the laws when his trade and business are stricken down to foster and promote that of his neighbor?

II.—The plaintiff offered to show in the Court below (page 6 of Record), "that the article sold by him was part of a large and valuable quantity *mauufactured* PRIOR to the 21st of May, 1885, in accordance with the laws of this Commonwealth relative to the manufacture and sale of said article and so sold by him; and that for the manufacture of said article large investments were made in the purchase of suitable real estate, the erection of proper buildings and the purchase of the necessary machinery and ingredients; that in his traffic in the said article the defendant made large profits, and that if the said defendant should be prevented from trafficking in said article the *value of his property engaged therein* would be entirely lost and he would be deprived of the means of a livelihood."

The case, then, also presents this point:

The *identical* oleomargarine, for the sale of which the plaintiff was convicted, was manufactured *prior* to and was in existence *when* the statute in question was passed.

When it was manufactured it was lawful so to do.

"The right to manufacture includes the incidental right to dispose of the liquors manufactured."

Beer Co. *vs.* Massachusetts, 97 U. S., 32.

Therefore, a statute which denies the right to buy or sell that manufactured article is in conflict with the XIV. Amendment to the Federal Constitution, in that it does deprive him of liberty and property withouf due process of law.

Does not this case fairly present the questions which this

Court said, in Bartmeyer *vs.* Iowa, 18 Wallace, 930, and Beer Co. *vs.* Massachusetts, 97 U. S., 25, would arise on an offer such as here made?

It is no answer to say that the plaintiff himself did not manufacture the oleomargarine prior to May 21, 1885, for as the right to manufacture it implied the right to sell it, it was, before and on May 21, 1885, a legitimate article of commerce which any one, the plaintiff in error included, might buy or sell. If he and others might not, what becomes of the right of property which the man who manufactured it had in it? Of what value is his property if he may not sell it; and whom can he sell it to if no one may buy to sell it again?

Munn *vs.* Illinois, 94 U. S., 113.
Bronson *vs.* Kinzie, 1st Howard, 311.

A legislative rescript is not a due process of law.

Murray's Lessee *vs.* Hoboken L. & I. Co., 18 Howard, 266.
Norman *vs.* Heist, 5 W. & Serg., 173.
Davidson *vs.* New Orleans, 96 U. S., 104.

Nor can the Legislature find a fact so as to conclude the Courts.

Sharpless *vs.* Mayor, etc., 9 Harris, 161.

III.—The XIV. Amendment to the Federal Constitution provides—*inter alia*—"*Nor shall any State deprive any person of life, liberty or property without due process of law.*"

The Act of the State of Pennsylvania of May 21st, 1885, does deprive the plaintiff in error and many others of "liberty *without* due process of law."

What is the "liberty" which is thus guarded? The language is simply "liberty." There is no limitation of it. It is not merely personal liberty or the absence of bodily restraint and freedom from incarceration, but "liberty" in its most comprehensive sense. The primary

definition of the word as given by Webster is: "The state of a freeman; ability to do as one pleases." It included *natural liberty* or the right which nature gives to all mankind of disposing of their property in the manner they judge most consonant to their happiness.—1 *Blackstone Com.*, 125.

Social liberty and *civil* liberty and *political* liberty and *personal* liberty were included in it.

In the Slaughter House Cases, 16 *Wallace*, 116, Mr. Justice Bradley said: "The rights to life, liberty and the pursuit of happiness are equivalent to the rights of life, liberty and property. * * * For the preservation, exercise and enjoyment of these rights the individual citizen *as a necessity must be left free to adopt such calling, profession or trade as may seem to him most conducive to that end. Without this right he cannot be a freeman. This right to chose one's calling is an essential part of that liberty which it is the object of government to protect, and a calling when chosen is a man's property and right. Liberty and property are not protected when these rights are arbitrarily assailed.*"

In the same case, page 97, Mr. Justice Field said that amongst the things which the citizen had of right "*must be placed the right to pursue a lawful employment in a lawful manner without other restraint* than such as equally affects all persons."

In the Butcher's Union Company *vs.* Crescent City Company, 111 *U. S.*, 761, Justices Bradley, Harlan and Woods agreed that "*The right to follow any of the common occupations of life is an inalienable right.*"

The Court of Appeals of New York in the People *vs.* Marx, 99 *New York*, 386, said:

"These constitutional safeguards have been so thoroughly discussed in recent cases that it would be superfluous to do more than to refer to the conclusions which have been reached bearing upon the question now under consideration. *Among these, no proposition is now more firmly established than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuits not injurious to the community as he may see fit.* * * * The term

'liberty' as protected by the Constitution is not cramped into a mere freedom from physical restraint of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare."

Bertholf *vs.* O'Reilly, 74 *New York*, 515.
In re Jacobs, 31 *Alb. L. J.*, 85.

"The general rule is that every person *sui juris* has a right to choose his own employment and to devote his labor to any calling."

Cooley's Principles of Con. Law, page 231.

In Munn *vs.* Illinois, 94 *U. S.*, 142, Mr. Justices Strong and Field held that, "By the term liberty, as used in the provision, something more is meant than mere freedom from physical restraint or the bonds of a prison. It means freedom to go where one may choose, and to act in such manner not inconsistent with the equal rights of others as his judgment may dictate for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities and give to them their highest enjoyment."

In part this language is from Magna Charta. There it was provided that "No freeman shall be taken or imprisoned, or be disseized of his freehold or liberties or free customs, or be outlawed or exiled, or any otherwise destroyed, nor will we pass upon him or condemn him but by the lawful judgment of his peers or by the law of the land."

Blackstone shows how this was enacted and re-enacted by different Parliaments, and he enumerates as amongst those rights of the "freeman" personal security, personal liberty and private property.

It was then for the plaintiff in error to choose his own trade or calling. It was part of his "liberty" so to do. Pennsylvania could not confine him in that choice, except from such trades and occupations and callings as affected

the public morals or health, or the peace, good order or safety of society. In other words, by some infraction on his part of a then existing valid police law, or the choice of some occupation which violated the maxim of "*Sic utere tuo ut alienum non leadas.*"

In this view of the case, it is immaterial whether he chooses his occupation before or after such an act is passed, for the prohibition of the amendment is upon the States which shall do nothing to deprive him of *liberty* without due process of law. Whether passed before or after he so chooses, is equally a denial of his liberty. If before, then only of his liberty; if afterwards, then also of property, because, in many cases, his calling or profession is his most valuable property.

Amongst other things, he chose the occupation of buying and selling oleomargarine, when along comes the Act of May 21, 1885, and takes from him his property, and forbids him from carrying on his trade.

The act says, if he does buy or sell oleomargarine, he will be imprisoned and fined. Not if he adulterates it, or manufactures it out of impure or hurtful fats, or seeks to impose it on the public as butter made from cream—*not that*—but if he has it perfectly pure, made out of the cleanest and most wholesome fats—a perfectly nutritious and wholesome article of food—still he will be fined and imprisoned whenever he sells it or offers to sell it, or conceives the idea of selling it in competition with dairy butter. The conviction in this case is on both counts of the indictment: (1) For selling. (2) *For having it on hand with intent to sell as an article of food.*

Under this act there is not to be any judicial investigation of any kind except this : did the defendant charged, sell, or have on hand with intent to sell, oleomargarine ? If so all other matters are immaterial. He is guilty.

Is this the *due process of law* the XIV. Amendment speaks of ? If so, what does the amendment signify, and what protection is it to any one ? The amendment, as this Court has repeatedly held, is directed against action by the

State. Now, if it is *due process of law* to pass an Act of Assembly and say that whoever sells dairy butter, or wheat, or molasses made from the cane, or whoever practices law, or medicine, shall be fined or imprisoned, then, indeed, *cui bono* the amendment?

If *due process of law* merely means a legislative act, why was this amendment ever passed?

It is idle to talk about a judicial trial when all the trial is to investigate whether the defendant did the act prohibited in the Act of Assembly, and does not at all involve the power of the Assembly to pass such an act, or whether it is or is not within the police power of the State. Such cannot be due process of law.

Murray's Lessee *vs.* Hoboken Co., 18 Howard, 266.
Davidson *vs.* New Orleans, 97 U. S., 28.
Lake View *vs.* Rose Hill Co., 70 Illinois, 191.
Gardner *vs.* Newburg, 2 Johns. Ch., 162.
Craig *vs.* Kline, 65 Penna. St.

To make a thing a crime which is necessary to and part of the "liberty" of the citizen, and then say that it is *due process of law* to call a jury and prove he did the thing described in the legislative enactment, and *therefore* he is not illegally deprived of his liberty, is to nullify the constitutional provision and subject his liberty to the caprice of a majority in the Legislature. Surely a construction which would involve such consequences will not be adopted.

The argument upon which the Supreme Court of Pennsylvania sustained the constitutionality of this law was this:

The police power is legislative, and when the Legislature determine that any trade, occupation or calling, or article of food, or indeed anything of any kind is baneful to the public health or morals, or comfort, it may pass such laws as it sees fit, and stamping them as police laws, the judiciary cannot inquire into the fact whether the law does *in fact* touch the public health, or peace, or comfort.

Perhaps this may be said to be an unfair statement of the reasoning of that Court, but its opinion, as found in the Record, pages 28, 29, 30 and 31, it is most respectfully submitted is fairly open to that criticism.

But suppose it be granted that the real grounds of the opinion are these: That oleomargarine is an article of food; it may be adulterated; *therefore* its use may be wholly prohibited just when the Legislature sees fit, and it is wholly irrelevant to show that the defendant charged sold only the absolutely pure article, which is wholly innocuous and a wholesome article of food.

This is the most favorable light in which the opinion can be viewed.

It would be folly to deny that oleomargarine may be adulterated, or more properly speaking, that dishonest men, for their own gain, may put into it such compounds as will make the product less desirable than the pure article; not, be it noticed, make the product hurtful to health but merely less palatable.

But is there any article of food that may not be so adulterated?

Is it not notorious that dairy butter, to foster which this act is passed, is often sold so adulterated and impure as to be hurtful to health?

Is it not the same with wheat bread, molasses, flour pepper, and indeed every article that is used as food?

And may the Legislature deprive me of the lawful industry and calling of making and selling pure wheat bread because the dishonest baker across the street adulterates his?

If so what trade or occupation may not be taken from one?

Dishonest lawyers abound. May my liberty or property in my profession be taken from me because of that?

Dishonest merchants sell miserable substitutes for silks and cloths. May the honest merchant, because of that, be prohibited from selling the genuine articles?

The Court below seem to rely greatly upon the Massachusetts case of Commonwealth *vs.* Farren, 91 Mass., 489, where the adulteration of milk by water was prohibited.

But that is not our case. Suppose the Massachusetts Legislature had wholly prohibited the sale of pure milk because some sold milk adulterated with water. Would such an act have been constitutional?

And yet such an act would have been the same in principle as the Pennsylvania Oleomargarine Act.

On what principle of law may I be punished, and punished directly, by an infringement of my constitutionally protected liberty because some one else dishonestly uses his liberty to harm the public?

You might just as well forbid me from drawing a check because some men forge them, or forbid me from going on the highway because some men use the highway to pick pockets, as to forbid me from selling pure bread because some men sell adulterated bread.

To the fullest extent we admit that all safeguards and protections may by law be enacted to prohibit the sale of adulterated, harmful articles of food, but just as certainly we also claim that a lawful, honest, wholesome, and utterly harmless business cannot be stricken down because there are rogues in it who act dishonestly.

But the Court say the extent or severity of the punishment is legislative, and the Courts cannot control its discretion.

Suppose it be so; but the punishment must be upon one who does an unlawful act, not upon the innocent—how can the Legislature take away my liberty or property because same other man uses his liberty or property for dishonest and harmful purposes?

The New York Court of Appeals in the People *vs.* Marx, 99 New York, 377, held an act identical with this to be unconstitutional, and Mr. Justice Gordon dissented from the judgment of the Court in the case at bar. See his opinion, pages 32, 33, 34 of Record.

For a brief discussion of this subject in a recent work, see Tiedeman's Limitations of Police Power, pages 295–297.

The lower Court said (Record, page 18) that the constitutionality of an act cannot be determined on the testimony of witnesses. But why?

Is not the testimony of witnesses the way the law points out to prove facts—and, indeed, as a fact is it not often so—that whether an act is unconstitutional depends upon the facts? In Pennsylvania especially this has been held, and although the very objection was urged against a decision holding that the foot-front rule as to assessment for rural property was unconstitutional, but for city property was constitutional, that different juries might find different ways, the Supreme Court held the objection not good.

Seely *vs.* City of Pittsburgh, 82 Penna. St., 360.

Washington Avenue, 69 *Id.*, 352.

Craig *v.* Philadelphia, 89 *Id.*, 265.

We print, in the Appendix, all the legislation in Pennsylvania on the subject of Oleomargarine.

To sum up the whole matter:

(I.)—The Act prohibiting the manufacture and sale of Oleomargarine is not within the Police Power—because it does not touch the public health, peace or morals.

(II.)—Not being so, it is an arbitrary, illegal enactment by which the plaintiff in error is deprived of his liberty and property without due process of law, and is by the State of Pennsylvania denied the equal protection of its law, and is therefore in conflict with the XIV. Amendment to the Federal Constitution.

(III.)—*Therefore*, the conviction and sentence in the Court below were illegal, and the judgment of the Supreme Court of Pennsylvania should be reversed.

(IV.)—And, therefore, this motion should be overruled.

WEISS & GILBERT,
D. T. WATSON,
Attys. for Pltff. in Error.

APPENDIX.

AN ACT

To Prevent Deception in the Sale of Butter and Cheese.

Section 1. Be it enacted, &c., that every person who shall manufacture for sale, or who shall offer or expose for sale, any article or substance in semblance of butter or cheese, not the legitimate product of the dairy, and not made exclusively of milk or cream, but into which the oil or fat of animals not produced from milk enters as a component part, or into which melted butter or any oil thereof has been introduced to take the place of cream, shall conspicuously and durably stamp, brand or mark upon every tub, firkin, box or package of such article or substance, the word "oleo-margarin," in type of letters not less than one-half inch; and in case of retail sale of such article or substance in parcels, the seller shall in all cases deliver therewith to the purchaser a written or printed label, bearing the plainly written or printed word "oleo-margarin," in type of letters as aforesaid; and every sale of such article or substance not so stamped, branded, marked or labelled, is declared to be unlawful, and no action shall be maintained in any of the Courts of this State to recover upon any contract for the sale of any such article or substance not so stamped, branded, marked or labelled.

Section 2. Every person who shall knowingly sell or offer to sell, or have in his or her possession with intent to sell, contrary to the provisions of this act, any of the said article or substance required by the first section of this act to be stamped, marked or labelled, as therein stated, not so stamped, marked or labelled, or in case of retail sale, without delivery of a label required by section one of this

act, shall, for each such offense forfeit and pay a fine of one hundred dollars, to be recovered with costs in any of the courts of this State having cognizance thereof, in an action to be prosecuted by the district attorney in the name of the people, and the one-half of such recovery shall be paid to the informer and the residue shall be applied to the support of the poor in the county where such recovery is had.

SECTION 3. Every person who shall knowingly sell, or offer or expose for sale, or who shall cause or procure to be sold or offered or exposed for sale, any article or substance required by the first section of this act to be conspicuously and durably marked, branded, stamped or labelled, not so marked, branded, stamped or labelled, shall be guilty of a misdemeanor, and on trial for such misdemeanor, proof of the sale, or offer or exposure alleged, shall be presumptive evidence of knowledge of the character of the article so sold or offered, and that the same was not marked, branded, stamped or labelled as required by this act.

Approved the 22d day of May, A. D. 1878.

J. F. HARTRANFT.

AN ACT

FOR THE PROTECTION OF DAIRYMEN AND TO PREVENT DECEPTION IN SALES OF BUTTER AND CHEESE.

SECTION 1. Be it enacted, &c., That every person who shall manufacture for sale, or who shall offer or expose for sale, or who shall export to a foreign country by the tub, firkin, box or package, or any greater quantity, any article or substance in semblance of butter or cheese, not the legitimate product of the dairy, and not made exclusively of milk or cream, but into which any oil, lard, or fat, not produced from milk or cream, enters as a component part, or into which melted butter or any oil thereof has been introduced to take the place of cream, shall distinctly and durably stamp, brand, or mark upon the side

of every cheese, and also upon the top and side of every such tub, firkin, box, or package of such article or substance the words "oleomargarine butter," or, if containing cheese, the words "imitation cheese" only, where it can be plainly seen in Roman letters, which shall be burned or painted thereon with permanent black paint in a straight line, and shall not be less than one-half inch in length, and if for export shall also invoice the same and clear the same through the Custom House as "oleomargarine butter," or, if cheese, as "imitation cheese," and in case of retail sales of such articles or substances in parcels, the seller shall, in all cases, sell or offer or expose the same for sale from a tub, firkin, box, or package stamped, branded, or marked as herein stated, and shall also deliver, therewith to the purchaser, printed labels bearing the plainly printed words "oleomargarine butter," or if cheese, the words "imitation cheese" only, in Roman letters, not less than one-half inch in length, which shall be printed in a straight line, and every sale of such article or substance, or export of the same, by the tub, firkin, box or package, or in any greater quantity, not so stamped, branded or marked, and if exported, not invoiced and cleared through the Custom House as "oleomargarine butter," or if cheese, as "imitation cheese," and every sale of such article or substance at retail in parcels that shall not be sold from a tub, firkin, box or package so stamped, branded or marked, or without delivery of a label therewith as above stated, is declared to be unlawful and void and no action upon any contract shall be maintained in any of the Courts of this State to recover upon any contract for the sale of any such article, or semblance not so stamped, branded, marked, labelled or sold.

SECTION 2. Every person who shall sell, or offer or expose for sale, or export to a foreign country, or have in his or her possession with intent to sell, by the tub, firkin, box or package, or in any greater quantity, any of the said article or substance, required by the first section of this act to be stamped, branded, marked and, if exported, invoiced and cleared through the Custom House as "oleomargarine butter" or "imitation cheese,"

as therein stated, that shall not be so stamped, branded, marked and, if exported, invoiced according to the provisions of this act, or in case of retail sales in parcels, every person who shall sell or offer or expose for sale any of said article or substance without selling, offering or exposing for sale the same from a tub, firkin, box or package stamped, branded or marked as in said first section stated, or without delivery of a label as required by section one of this act, shall for every such offense forfeit and pay a fine of one hundred dollars, to be recovered, with costs, in any of the courts in this State having cognizance thereof, in an action to be prosecuted by any district attorney in the name of the Commonwealth, and shall be paid into the County Treasury.

SECTION 3. Every person who shall sell or offer or expose for sale or export to a foreign country, or who shall cause or procure to be sold, offered or exposed for sale by the tub, firkin, box or package, or in any greater quantity, any article or substance required by the first section of this act to be stamped, branded, marked and, if exported, invoiced and cleared, as therein stated, not so stamped, branded, marked, and if exported, invoiced and cleared, or in case of retail sales in parcels every person who shall sell, or offer or expose for sale, or who shall cause or procure to be sold, offered or exposed for sale, any article or substance required by the first section of this act to be sold, offered or exposed for such sale from a tub, firkin, box or package stamped, branded or marked and labelled as therein stated, contrary to the provisions of said section, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than fifty dollars, nor more than two hundred dollars, or by imprisonment in the County Jail for not less than ten nor more than thirty days, or by both such fine and imprisonment for each and every offense.

SECTION 4. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

Approved the 24th day of May, A. D. 1883.

ROBT. E. PATTISON.

AN ACT

FOR THE PROTECTION OF THE PUBLIC HEALTH, AND TO PREVENT ADULTERATION OF DAIRY PRODUCTS AND FRAUD IN THE SALE THEREOF.

SECTION 1. Be it enacted &c., That no person, firm or corporate body, shall manufacture out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk or of cream from the same, any article designed to take the place of butter or cheese produced from pure, unadulterated milk, or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her or their possession, with intent to sell the same as an article of food.

SECTION 2. Every sale of such article or substance, which is prohibited by the first section of this act, made after this act shall take effect, is hereby declared to be unlawful and void, and no action shall be maintained in any of the courts of this State to recover upon any contract for the sale of any such article or substance.

SECTION 3. Every person, company, firm or corporate body who shall manufacture, sell or offer or expose for sale, or have in his or their possession with intent to sell, any substance, the manufacture and sale of which is prohibited by the first section of this act, shall, for every such offense, forfeit and pay the sum of one hundred dollars, which shall be recoverable with costs by any person suing in the name of the Commonwealth, as debts of like amount are by law recoverable; one-half of which sum, when so recovered, shall be paid to the proper county treasurer for the use of the county in which suit is brought, and the other half to the person or persons at whose instance such a suit shall or may be commenced and prosecuted to recovery.

SECTION 4. Every person who violates the provisions of the first section of this act, shall be deemed guilty of a mis-

demeanor, and upon conviction, shall be punished by a fine of not less than one hundred dollars, nor more than three hundred, or by imprisonment in the county jail for not less than ten nor more than thirty days, or both such fine and imprisonment for the first offense, and imprisonment for one year for every subsequent offense.

SECTION 5. It shall be the duty of constables of the several cities, boroughs, wards and townships of this Commonwealth, to make quarterly reports under oath to the courts of quarter sessions of all violations of any of the provisions of this act which may come or be brought to their notice, and it shall be the duty of the judges of the said courts to see that the said returns are made regularly and faithfully.

SECTION 6. This act shall take effect on the first day of July, one thousand eight hundred and eighty-five.

SECTION 7. All acts or parts of acts inconsistent with the prvoisions of this act are hereby repealed.

Approved the 21st day of May, A. D. 1885.

ROBT. E. PATTISON.